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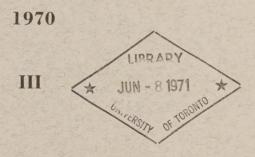


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# IMMIGRATION APPEAL CASES AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

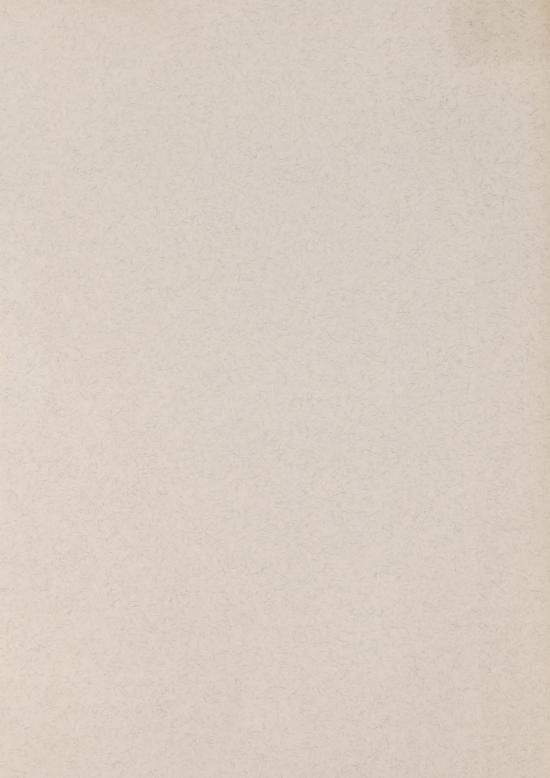


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## IMMIGRATION APPEAL CASES AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

### [1970] VOLUME III

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22. Luigi PIVETTA,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 27, 1969; File: 69-662.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, J.A. Byrne.

Border - Effect of transit and refusal of admission to another country. Nature of person "seeking to enter" - Immigration Act: 23, 24.

Held: Pursuant to the Cardenas case, a person who has been in Canada, whatever his status here, whether legal or illegal, and who endeavours to enter the United States, Alaska, or St-Pierre-et-Miquelon from Canada, but is refused entry and returns to Canada, has never left Canada. Their geographical presence in one of the three territories named has no significance, since they have never acquired any status there - legal or illegal - as far as the United States or France is concerned they are unpersons. For the purposes of section 24(1), such persons are not seeking to come into Canada from the territories there designated; they are seeking to come into Canada from Canada - if they have been previously illegally in Canada or have been in Canada as nonimmigrants and ask for landed immigrant status, or a change in their non-immigrant category, when they report to the Canadian border post on their return from the United States or French border post. An inquiry, pursuant to section 24(2), not a further examination pursuant to section 24(1), is the proper procedure, and the only legal one in this case. If, of course they have a continuing legal status in Canada and do not wish to change it, they are not seeking to come into Canada at all, and neither section 23 or section 24 of the Immigration Act would apply. A further examination, pursuant to section 24(1) can only be used using the United States as an example - when the person concerned has actually been in that country both geographically and with some kind of status, legal or illegal.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

This is an appeal from a deportation order made by Special Inquiry Officer B. Rihbany, on April 10, 1969, at Windsor, Ontario, against the appellant, Luigi Pivetta, in the following terms:

- "(i) you are not a Canadian citizen;
- (ii) you are not a person having Canadian domicile, and that

22. Luigi PIVETTA,

appelant,

v .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 27 novembre 1969; Dossier: 69-662.

Coram: M11e J.V. Scott, président, Jean-Pierre Houle, J.A. Byrne.

Frontière - Résultat du passage et du refus d'admission dans un autre pays. - Nature de la personne qui "cherche à entrer au". - Loi sur l'immigration: 23, 24.

Arrêt: En vertu de la décision Cardenas, une personne qui a été au Canada, quel que soit son statut ici, légal ou illégal, et qui tente d'entrer aux États-Unis, en Alaska ou à Saint-Pierre-et-Miquelon en provenance du Canada, mais à qui on refuse l'entrée et que l'on revoit au Canada, n'a jamais quitté le Canada. Sa présence géographique sur l'un des trois territoires mentionnés n'a aucune signification, puisqu' elle n'y a jamais acquis de statut, légal ou illégal; aux yeux de la France ou des États-Unis, elle n'existe même pas. Aux fins de l'article 24(1), une telle personne ne cherche pas à venir au Canada des territoires mentionnés; elle cherche à venir au Canada à partir du Canada, si sa présence antérieure au Canada était illégale ou si elle demande de passer du statut de non-immigrant à celui d'immigrant reçu, ou un changement de catégorie de non-immigrants, lorsqu'elle se présente au postefrontière canadien à son retour du poste-frontière français ou américain. La procédure à suivre dans ce cas, et la seule qui soit légale, est celle d'une enquête prévue à l'article 24(2), non pas celle d'une enquête complémentaire prévue par l'article 24(1). Bien entendu, si elle a un statut légal permanent au Canada et ne veut pas le modifier, elle ne cherche pas à venir au Canada et ni l'article 23 ni l'article 24 de la Loi sur l'immigration ne s'appliquent. Une enquête complémentaire prévue à l'article 24(1) ne peut être tenue lorsqu'il s'agit des États-Unis par exemple, que lorsque la personne en question est véritablement allée dans ce pays, d'un point de vue géographique et y a acquis un statut quelconque, légal ou illégal.

Le jugement de la Cour fut rendu par:

Mlle J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue par l'enquêteur spécial B. Rihbany, le 10 avril 1969 à Windsor, Ontario, contre l'appelant, Luigi Pivetta. L'ordonnance est rédigée comme suit:

(iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of the fact that you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part 1, amended of the Immigration Act and your passport does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister, as required by subsection (1) of section 29 of the Immigration Regulations, Part 1, amended of the Immigration Act."

This order was made after a further examination conducted pursuant to section 24(1) of the Immigration Act, which reads as follows:

"24. (1) Where the Special Inquiry Officer receives a report under section 23 concerning a person who seeks to come into Canada from the United States of America. Alaska or St. Pierre and Miquelon, he shall, after such further examination as he may deem necessary and subject to any regulations made in that behalf, admit such person or let him come into Canada or make deportation order against such person, and in the latter case such person shall be returned as soon as practicable to the place whence he came to Canada."

The summary of the further examination indicates that Mr. Pivetta originally entered Canada at Windsor, Ontario, on March 17, 1969, and was granted visitor's status in this country until April 5, 1969. He arrived on this continent at New York City on March 10, 1969 and was granted an in transit visa by the United States Immigration authorities to enable him to visit Canada. He applied for permanent residence in Canada on March 26, 1969, but his application was refused and he was given a "check out letter" valid to April 14, 1969. On April 10, 1969, he endeavoured to proceed to the United States via the Windsor-Detroit tunnel, but was refused entry to that country at the United States border post. He returned to the Canadian border post and the further examination resulting in the deportation order above quoted then took place.

The question in this appeal is whether it was proper to hold a further examination rather than an inquiry under the circumstances of this case.

In Belt y de Cardenas V. Min. of Manpower and Immigration, (1969) 1 I.A.C. 134, the appellant, who had resided in Canada illegally for some time, endeavoured to enter the United States and was turned back by the United States Immigration authorities at the border.

- "(i) you are not a Canadian citizen;
- (ii) you are not a person having Canadian domicile, and that
- (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of the fact that you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part 1, amended of the Immigration Act and your passport does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister, as required by subsection (1) of section 29 of the Immigration Regulations, Part 1, amended of the Immigration Act."

Cette ordonnance a été rendue à la suite d'une enquête complémentaire prévue par l'article 24(1) de la Loi sur l'immigration qui prévoit ce qui suit:

"24(1) Lorsque l'enquêteur spécial reçoit un rapport prévu à l'article 23 sur une personne qui cherche à venir au Canada des États-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon, il doit, après enquête complémentaire qu'il juge nécessaire et sous réserve de tous règlements établis à cet égard, admettre cette personne ou lui permettre d'entrer au Canada, ou rendre contre elle une ordonnance d'expulsion et, dans ce dernier cas, ladite personne doit, le plus tôt possible, être renvoyée au lieu d'où elle est venue au Canada.

Le résumé de l'enquête complémentaire indique que M. Pivetta est entré au Canada pour la première fois à Windsor, Ontario, le 17 mars 1969, et qu'on lui accorda le statut de visiteur au Canada jusqu'au 5 avril 1969. Il était débarqué sur le conținent à New-York le 10 mars 1969 et les autorités de l'immigration des États-Unis lui avaient accordé un visa de transit afin qu'il puisse se rendre au Canada. Il a demandé la résidence permanente au Canada le 26 mars 1969 mais sa demande a été refusée et il reçut une lettre de sortie ("check-out letter") valide jusqu'au 14 avril 1969. Le 10 avril 1969, il tenta de se rendre aux États-Unis par le tunnel Windsor-Détroit, mais on lui refusa l'entrée de ce pays au poste-frontière des États-Unis. Il revint au poste-frontière du Canada et c'est à ce moment qu'eut lieu l'enquête complémentaire dont résulta l'ordonnance d'expulsion ci-devant citée.

La question en cet appel est de savoir si il est régulier de tenir une enquête complémentaire plutôt qu'une enquête dans les circonstances de cette affaire. He was ordered deported after a further examination. The Board allowed the appeal on the ground that the appellant "was never 'in'" the United States in the sense that he could be treated as coming 'from' that country within the meaning of section 24(1). On December 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in Baruch v. Min. M. & I.) technically 'from' England, since he was originally legally entered in Canada as a tourist from that country although it is not necessary to decide this. He therefore fell within the provisions of section 24(2), not section 24(1) of the Immigration Act, and the correct procedure in his case was an inquiry rather than a further examination... The use of a further examination rather than an inquiry....was a fundamental defect in substance going to the root of the whole proceedings leading up to and flowing from the deportation order (which)... is therefore null and void..."

Mr. Cardenas had never lived in the United States at any material time before his original entry into Canada.

In Spann v. Min. M. & I. (I.A.B. December 5, 1968, unreported), which was cited with approval in Cardenas, the female appellant, a native of Jamaica residing in Canada, sought to enter the United States, but was refused entry and turned back at the border. She was ordered deported by the Canadian Immigration authorities after a further examination. Her appeal was allowed. In rendering the judgment of the Board, J.P. Houle, Member (as he then was) stated:

"Le passage 'physique' sur la limite séparant deux états, ce qui est proprement la définition de frontière, ne saurait, dans l'opinion de la Commission, créer une fiction légale fondant un rapport d'un officer d'immigration en vertu de l'article 23 et la tenue d'une enquête complémentaire sous l'article 24(1) de la Loi sur l'immigration.

En conséquence la Commission arrête que le rapport de l'officier d'immigration, dans l'instance, est non valide et nul et entraîne la non validité et la nullité de l'enquête complémentaire et de l'ordonnance d'expulsion."

 $\,$  Mrs. Spann had entered Canada originally from Jamaica, and had never been in the United States at any material time.

In Johnson v. Min. M. & I. (I.A.B. July 16, 1969, unreported) the appellant originally entered Canada from Trinidad and Tobago. After some eighteen months in this country (during most of which he was here illegally) he endeavoured to enter the United States, but was refused entry and turned back at the border. He was ordered deported by the Canadian Immigration authorities after a further examination. The Board allowed the appeal following its reasoning in Cardenas. Mr. Johnson had never been in the United States at any material time prior to his original entry into Canada.

Dans l'affaire Belt y de Cardenas c. le ministre de la Maind'oeuvre et de l'Immigration (1969) 1 A.I.A. 134, l'appelant, qui était demeuré au Canada illégalement fort longtemps, avait tenté d'entrer aux États-Unis mais il avait été refoulé à la frontière par les autorités de l'Immigration des États-Unis. La Commission a accueilli l'appel, donnant pour raison que l'appelant "was never 'in' the United States in the sense that he could be treated as coming 'from' that country within the meaning of section 24(1). On December 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in Baruch v. Min. M. & I.) technically 'from' England, since he was originally legally entered in Canada as a tourist from that country, although it is not necessary to decide this. He therefore fell within the provisions of section 24(2), not section 24(1) of the Immigration Act, and the correct procedure in this case was an inquiry rather than a further examination .... The use of a further examination rather than an inquiry .... was a fundamental defect in substance going to the root of the whole proceedings leading up to and flowing from the deportation order (which) .... is therefore null and void ...."

M. Cardenas n'avait fait de séjour appréciable aux Etats-Unis avant sa première entrée au Canada.

Dans l'affaire Spann c. Min. M. & I. (C.A.I., le 5 décembre 1968, non publiée), citée avec approbation dans Cardenas, l'appelante, originaire de Jamaïque, qui demeurait au Canada, avait tenté d'entrer aux États-Unis, mais on lui en refusa l'accès à la frontière. Les autorités canadiennes ordonnèrent son expulsion après une enquête complémentaire. Son appel fut accueilli. Le membre (à ce moment-là) de la Commission J.-P. Houle déclarait dans la décision:

"Le passage 'physique' de la limite séparant deux états, ce qui est proprement la définition de frontière, ne saurait, dans l'opinion de la Commission, créer une fiction légale fondant un rapport d'un officier d'immigration en vertu de l'article 23 et la tenue d'une enquête complémentaire sous l'article 24(1) de la Loi sur l'immigration.

En conséquence la Commission arrête que le rapport de l'officier d'immigration, dans l'instance, est non valide et nul et entraîne la non validité et la nullité de l'enquête complémentaire et de l'ordonnance d'expulsion."

Mme Spann était entrée au Canada la première fois en provenance de Jamaïque et elle n'avait jamais fait de séjour appréciable aux États-Unis.

In Lagunas v. Min. of M. & I. (I.A.B. May 21, 1969, unreported) the appellant entered Canada from Spain where he had been residing. After some weeks he sought to enter the United States but was refused entry and turned back at the border. He was ordered deported by the Canadian Immigration authorities after a further examination. The appeal was allowed by application of the principle laid down in Cardenas. At no material time prior to his original entry into Canada had he been in the United States.

In Tonner v. Min. M. & I. (I.A.B. September 23, 1968, unreported) the point subsequently decided in Cardenas was raised by counsel for the appellant, but the appeal was allowed on other grounds and the matter was not dealt with by the Board. Tonner was admitted to Canada as a landed immigrant in 1947. In 1960 he was granted landed immigrant status in the United States, where he resided until 1967. He reentered Canada in that year, from the United States, in order to arrange a change of residence to this country. He subsequently sought to reenter the United States on a visit, and was refused entry and returned to Canada, where he was ordered deported after a further examination. In arguing on this point appellant's counsel, Mr. G.P. Killeen, Barrister, said (p. 69-71, transcript of hearing):

"Now, it is obvious from the plain words of Special Inquiry Officer McClenaghan's deportation order that it was made under Section 24(1). Now, if that is the case, then presumably they were treating him as having come into Canada from the United States of America because that is the only basis upon which jurisdiction operates to make the order in those circumstances but the fact of the matter is and this is set out in the memorandum, the order and in the evidence today, all incontestable, this man never got back into the United States on June 13th 1967. He was refused entry into the United States by a Special Inquiry Officer in the United States at the United States border point checkpoint, so if he never got into the United States and was refused entry, and that's the thrust of all of the evidence, then Section 24(1) cannot operate as a basis upon which a deportation order can be made against this man because the Section is plain, clear and unequivocal. It says "24.... concerning a person who seeks to come into Canada from the United States of America...". That means what it says, the common ordinary meaning must be given to the words of that Section unless there is ambiguity. There is not ambiguity. I don't need to belabour you with the principles of construction of statute law other than to say that in the absence of ambiguity the words of a statute must be construed according to their plain ordinary and common meaning. It would be incumbent upon my friend to show the ambiguity. The onus would then be upon him to show the ambiguity in the words of the subsection but I submit the

Dans l'affaire Johnson c. Min. M. & I. (C.A.I., 16 juillet 1969, non publiée) l'appelant était entré au Canada en provenance de Trinidad et Tobago. Après environ dix-huit mois de séjour au pays, séjour en grande partie illégal, il tenta d'entrer aux États-Unis mais l'entrée lui fut refusée et il dut rebrousser chemin à la frontière. Les autorités de l'immigration canadienne ordonnèrent son expulsion après une enquête complémentaire. La Commission accueillit l'appel pour les mêmes raisons que dans l'affaire Cardenas. M. Johnson n'avait pas fait de séjour appréciable aux États-Unis avant sa première entrée au Canada.

Dans l'affaire Lagunas c. Min. M. & I. (C.A.I., le 21 mai 1969, non publiée) l'appelant est entré au Canada en provenance d'Espagne, où il résidait. Après quelques semaines, il chercha à entrer aux États-Unis mais on lui refusa l'entrée et on le renvoya à la frontière. Les autorités canadiennes de l'immigration ordonnèrent son expulsion après une enquête complémentaire. L'appel fut accueilli à l'application du principe établi dans Cardenas. Il n'avait fait aucun séjour appréciable aux États-Unis avant sa première entrée au Canada.

Dans l'affaire Tonner c. Min. M. & I. (C.A.I., 23 septembre 1968, non publiée), la question qui allait plus tard être décidée dans l'affaire Cardenas fut soulevée par l'avocat de l'appelant, mais l'appel fut accueilli pour d'autres motifs et la Commission ne s'arrêta pas sur la question. Tonner avait été admis au Canada comme immigrant reçu en 1947. En 1960, les États-Unis lui accordèrent le statut d'immigrant reçu et il y demeura jusqu'en 1967. Il entra de nouveau au Canada cette année-là, en provenance des États-Unis, en vue d'entreprendre des démarches pour établir sa résidence ici. Il chercha plus tard à retourner aux États-Unis comme visiteur, mais on lui refusa l'entrée et on le renvoya au Canada où il fut expulsé après une enquête complémentaire. Arguant sur ce point, l'avocat de l'appelant, Me G.P. Killeen, déclara ceci (pp. 69-71, procès-verbal de l'audition):

"Now it is obvious from the plain words of Special Inquiry Officer McClenaghan's deportation order that it was made under Section 24(1). Now, if that is the case, then presumably they were treating him as having come into Canada from the United States of America because that is the only basis upon which jurisdiction operates to make the order in those circumstances but the fact of the matter is, and this is set out in the memorandum, the order and in the evidence today, all incontestable, this man never got back in the United States on June 13th 1967. He was refused entry in the United States at the United States border check point, so if he never got in the United States and was refused entry, and that's the thrust of all the evidence, than section 24(1) cannot operate as

language is clear, unequivocal and straightforward and I suggest that the ordinary meaning given to those words is he must be a person coming into Canada from the United States. He wasn't. He was refused entry to the United States. I don't care if he was in No-Man's-Land or in Canada. The inevitable thrust of the evidence is he did not come into Canada from the United States. Therefore, the Special Inquiry Officer has no jurisdiction under section 24(1) to make any order against this man."

As noted above, the Board did not deal with this point.

In Bryant v. Min. M. & I. (I.A.B. 26 August 1969, unreported) the appellant, a citizen of Jamaica, resided for some years, illegally, in the United States. He entered Canada, legally, as a visitor, but when he endeavoured to return to the United States he was refused entry to that country and was returned to Canada, where a further examination was held and his deportation ordered. The Board allowed the appeal, for the reasons set out in Cardenas. It will be noted that Mr. Bryant originally entered Canada from the United States, but he was illegally residing in that country at the time.

In Ng v. Min. M. & I. (I.A.B. August 7, 1969) the appelant, a citizen of the Philippines, resided in the United States, legally, until the expiry of his United States visa on January 1, 1969. He remained in that country, illegally, until April 16, 1969, when he entered Canada. When he sought to reenter the United States he was refused entry and returned to Canada where he was ordered deported after a further examination. The Board allowed the appeal following Cardenas, Lagunas, and Johnson. Mr. Ng originally entered Canada geographically from the United States, but was illegally in that country at the time.

In Baruch v. Min. M. & I. (I.A.B. December 9, 1968, unreported) referred to in Cardenas, the appellant had been a legal resident of the United States for some months. He entered Canada as a visitor, but was refused admission to the United States when he sought to return thither. On his return to the Canadian border post a further examination was held and he was ordered deported. The Board dismissed the appeal. In an oral judgment, J.P. Geoffroy, Vice-Chairman, stated:

"The Board, after considering the evidence and the arguments, came to the conclusion that because of the fact that the Appellant's non-immigrant visa had expired on the 26th of June and that he had applied for a new non-immigrant visa, the Examining Officer was right to consider him as a person seeking admission to Canada and seeking admission as of his first entry, meaning coming from the United States."

a basis upon which a deportation order can be made against this man because the Section is plain, clear and unequivocal. It says "24... concerning a person who seeks to come into Canada from the United States of America..." That means what it says, the common ordinary meaning must be given to the words of that Section unless there is ambiguity. There is no ambiguity. I don't need to belabour you with the principles of construction of statute law other than to say that in the absence of ambiguity the words of a statute must be construed according to their plain ordinary and common meaning. It would be incumbent upon my friend to show the ambiguity. The onus would then be upon him to show the ambiguity in the words of the subsection but I submit the language is clear, unequivocal and straight-forward and I suggest the ordinary meaning given to those words is he must be a person coming into Canada from the United States. He wasn't. He was refused entry to the United States. I don't care if he was in No-Man's-Land or Canada. The inevitable thrust of the evidence is he did not come into Canada from the United States. Therefore the Special Inquiry Officer has no jurisdiction under section 24(1) to make any order against this man."

Comme nous l'avons déjà dit, la Commission ne s'est pas arrêtée sur ce point.

Dans l'affaire Bryant c. Min. M. & I. (C.A.I., 26 août 1969, non publiée), l'appelant, un citoyen de la Jamaique était demeuré quelques années illégalement aux États-Unis. Il est entré au Canada légalement, comme visiteur mais lorsqu'il tenta de retourner aux États-Unis, on lui refusa l'entrée dans ce pays et on le renvoya au Canada, où une enquête complémentaire fut tenue et une ordonnance d'expulsion émise. La Commission accueillit l'appel suivant les cas Cardenas, Lagunas et Johnson. La première fois, M. Ng était entré géographiquement au Canada des États-Unis où il demeurait illégalement à ce moment-là.

Dans l'affaire Baruch c. Min. I. & M. (C.A.I., 9 décembre 1968, non publiée) à laquelle se rapporte la décision Cardenas, l'appelant avait résidé légalement aux États-Unis pendant quelques mois. Il était entré au Canada comme visiteur mais lorsqu'il voulut rentrer aux États-Unis, on lui refusa l'admission. À son retour au poste-frontière canadien une enquête complémentaire fut tenue et une ordonnance d'expulsion rendue contre lui. La Commission rejeta l'appel. Dans un jugement oral, J.P. Geoffroy, le vice-président, déclarait ce qui suit:

The record in this case is not entirely clear as to Mr. Baruch's actual status in the United States before his original entry into Canada.

In Bartolo v. Min. M. & I. (I.A.B. January 14, 1969, unreported) the appellant had entered Canada from Belgium. He endeavoured to enter the United States, was refused, and on his return to Canada was ordered deported after a further examination. His appeal was dismissed.

It will be seen that Baruch and Bartolo are contrary to the otherwise consistent line of thinking expressed in the other cases above quoted. The philosophy behind what may be called the Cardenas line of cases is this: persons who have been in Canada, whatever their status here, whether legal or illegal, and who endeavour to enter the United States, Alaska or St-Pierre-et-Miquelon from Canada, but are refused entry and return to Canada, have never left Canada. Their geographical presence in one of the three territories named has no significance, since they have never acquired any status there - legal or illegal - as far as the United States or France is concerned they are unpersons. For the purposes of section 24(1), such persons are not seeking to come into Canada from the territories there designated, they are seeking to come into Canada from Canada - if they have been previously illegally in Canada or have been in Canada as non-immigrants and ask for landed immigrant status, or a change in their non-immigrant category, when they report to the Canadian border post on their return from the United States or French border post. An inquiry, pursuant to section 24(2), not a further examination pursuant to section 24(1) is the proper procedure, and the only legal procedure in their case. If, of course, they have a continuing legal status in Canada and do not wish to change it, they are not seeking to come into Canada at all, and neither section 23 or section 24 of the Immigration Act would apply. (Grabczak v. Minister M. & I., I.A.B., 25 October 1968, unreported).

It must be stated that for the purposes of section 24(1) in the situation presently under discussion, the place from which the person concerned originally came to Canada is irrelevant. The statement in Cardenas: "On December 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in Baruch v. Min. M. & I.) Canada as a tourist from that country, although it is not necessary to decide this", is object, and totally irrelevant to the point under discussion.

A further examination, pursuant to section 24(1) can only be used - using the United States as an example - when the person concerned has actually been in that country both geographically and with some kind of status, legal or illegal. To take the Bryant situation as an example, if it had been considered proper to order the deportation of Mr. Bryant at the time he originally came into this country, a further examination would have been correct; since he was in Canada, and on endeavouring to return to the United States was turned back at the border, an inquiry was the correct procedure.

"The Board, after considering the evidence and the arguments, came to the conclusion that because of the fact that the appellant's non-immigrant visa had expired on the 26th of June and that he had applied for a new non-immigrant visa, the Examining Officer was right to consider him as a person seeking admission to Canada and seeking admission as of his first entry, meaning coming from the United States."

Le dossier de cette affaire n'est pas clair quant au véritable statut de M. Baruch aux États-Unis lorsqu'il est entré au Canada pour la première fois.

Dans l'affaire Bartolo c. Min. M. & I. (C.A.I., le 14 janvier 1969, non publiée) l'appelant était entré au Canada en provenance de Belgique. Il tenta sans succès d'entrer aux États-Unis et à son retour au Canada une ordonnance d'expulsion fut émise contre lui à la suite d'une enquête complémentaire. Son appel fut rejeté.

Il est à noter que les décisions Baruch et Bartolo vont dans le sens contraire de la ligne de pensée par ailleurs consistante exprimée dans les autres décisions ci-devant citées. Le principe dont s'inspire la décision Cardenas et les autres dans le même sens est le suivant: les personnes qui ont été au Canada, quel que soit leur statut ici, légal ou illégal, et qui tentent d'entrer aux États-Unis, en Alaska ou à Saint-Pierre-et-Miquelon en provenance du Canada, mais à qui on refuse l'entrée et que l'on renvoie au Canada, n'ont jamais quitté le Canada. Leur présence géographique sur l'un ou l'autre des territoires mentionnés n'a aucune signification puisqu' elles n'y ont jamais acquis de statut, légal ou illégal: aux yeux des États-Unis ou de la France, elle n'existent même pas. Aux fins de l'article 24(1), ces personnes ne cherchent pas à venir au Canada des territoires mentionnés, elles cherchent à venir au Canada du Canada, si leur présence antérieure au Canada était illégale, ou si elles avaient le statut de non-immigrant et demandent celui d'immigrant reçu ou un changement de catégorie de non-immigrant lorsqu'elles se présentent au poste frontière à leur retour du poste-frontière des États-Unis ou de la France.

La procédure à suivre alors, la seule qui soit légale dans ce cas, est celle d'une enquête aux termes de l'article 24(2). Bien entendu, si elles ont un statut légal permanent au Canada et si elles ne veulent pas le modifier, elles ne cherchent pas alors à entrer au Canada et ni l'article 23 ni l'article 24 de la Loi sur l'immigration ne s'appliquent (Grabczak c. min. M. & I., C. A.I.I., 25 octobre 1968, non publié).

Il faut dire qu'aux fins de l'article 24(1) dans la situation qui nous concerne, le lieu dont la personne est venue au Canada la première fois n'a pas d'importance. Cette déclaration de la décision Cardenas, "On december 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in Baruch v. Min. M.&I.)

It is clear that the Bartolo and Baruch cases are wrong, and they are hereby overruled.

In the instant appeal, the facts are on all fours with the Cardenas case and related cases. On April 10, 1969, when Mr. Pivetta was turned back at the United States border post in Detroit, he had never left Canada. When he presented himself at the Canadian Immigration border post, he stated, according to the summary of further examination, that "he intended to reside in Canada and accept employment". He was "seeking to come into Canada" - seeking admission - in Canada. He was thus seeking to change his status - and he had a legal status since his check out letter did not expire until April 14, 1969. He may well have been subject to deportation on grounds set out in the Immigration Act, but after an inquiry pursuant to section 24(2), not a further examination pursuant to section 24(1). Since the use of a further examination in such a situation is a substantive defect, the appeal must be allowed.

Dated at Ottawa, this 8th day of January 1970.

Concurred in by: Jean-Pierre Houle and J.A. Byrne.

For the appellant: Anthony E. Cusinato, Barrister and Solicitor;

For the respondent: E.R. Sojonky, Barrister and Solicitor.

technically "from" England, since he was originally legally entered in Canada as a tourist from that country, although it is not necessary to decide this", est sans incidence juridique et elle ne concerne en rien la question traitée.

Une enquête complémentaire prévue par l'article 24(1) ne peut avoir lieu, lorsqu'il s'agit des États-Unis par exemple, que lorsque la personne en question a déjà été dans ce pays géographiquement et qu'elle y a détenu un statut quelconque, légal ou illégal. Dans le cas de Bryant, par exemple, il aurait été correct de tenir une enquête complémentaire s'il avait été jugé régulier de rendre contre lui une ordonnance d'expulsion au moment de sa première entrée au Canada; mais puisqu'il était au Canada et que lorsqu'il voulut se rendre aux États-Unis il fut refoulé à la frontière, il eut fallu tenir une enquête.

Il est clair que les décisions Bartolo et Baruch sont fausses et elles sont annulées par la présente.

Dans l'instance les faits coïncident avec ceux de l'affaire Cardenas et autres semblables. Le 10 avril 1969, lorsque M. Pivetta fut refusé au poste-frontière des États-Unis à Détroit, il n'avait jamais quitté le Canada. Lorsqu'il s'est présenté au poste-frontière de l'Immigration canadienne, il a déclaré, selon le résumé de l'enquête complémentaire, que "he intended to reside in Canada and accept employment". Il "cherchait à venir au Canada" - demandait l'admission au Canada. Par conséquent, il voulait faire modifier son statut légal puisque sa lettre de sortie n'expirait que le 14 avril 1969. Il eut peut-être été passible d'expulsion en vertu des motifs mentionnés dans la loi sur l'Immigration, mais après l'enquête prévue par l'article 24(2) et non après l'enquête complémentaire prévue par l'article 24(1). Puisque la tenue d'une enquête complémentaire dans une telle situation constitue un défaut réel, l'appel doit être accueilli.

Fait à Ottawa, le 8 janvier 1970.

Ont souscrit: Jean-Pierre Houle et J.A. Byrne.

Pour l'appelant: Me Anthony E. Cusinato;

Pour l'intimé: Me E.R. Sojonky.

23. QUAN Wing Yut,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: January 16, 1970; File: 69-521.

Coram: J.C.A. Campbell, Vice-Chairman, U. Benedetti, J.A. Byrne

Sponsored application - inadmissible because of previous false declaration - whether passing of five years takes her out of prohibited classes. - Immigration Act: 5(d); Immigration Regulations: 36

Held: The fact that more than five years have elapsed since the making of a false declaration of a nominated immigrant does not take her out of the prohibited classes unless and until Governor-in-Council authority is obtained to permit a person to be admitted to Canada. Furthermore the Statutory Declaration which she signed on January 17, 1968 is within the five year period set out in Section 5(d) of the Immigration Act. Also, appellant is not entitled to sponsor Miss Fong since both were previously married and no credible evidence was adduced that they are free to marry.

The Judgment of the Board was delivered by:

#### J.C.A. Campbell, Vice-chairman:

This is an appeal from a refusal to approve the application by Quan Wing Yut for the admission into Canada of Fong Choi Yee pursuant to the Regulations made under the Immigration Act. The letter of refusal sent to Fong Choi Yee is as follows:

File No. 410-1-13324

Madam Fong Choi Yee 281A Shun Ning Road 2nd Floor Kowloon

27 February 1969

Dear Madam;

This is with reference to your application for admission to Canada.

I wish to inform you that application for admission to Canada is refused as you have not submitted any evidence that your husband is dead or legally presumed to be dead, that complies with the requirements of Regulation 36, Part I, Amended, of the Canadian Immigration Regulations.

23. QUAN Wing Yut,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration.

intimé.

Date de la décision: 16 janvier 1970; Dossier: 69-521

Coram: J.C.A. Campbell, Vice-président, U Benedetti, J.A. Byrne.

Demande avec répondant - non recevable à cause d'une fausse déclaration antérieure - si un délai de cinq and la retire de la catégorie interdite - Loi sur l'immigration: 5(d); Règlement sur l'immigration: 36.

Arrêt: Les cinq années et plus écoulées depuis la prononciation de la fausse déclaration de Fong Choi ne la retirent pas de la catégorie interdite, à moins et jusqu'à ce que le Gouverneur en Conseil autorise l'admission au Canada de cette personne. Par ailleurs, la déclaration statutaire qu'elle a signée le 17 janvier 1968 est dans le délai de cinq ans exprimé à l'article 5(d) de la Loi sur l'immigration. Enfin, l'appelant ne peut être le répondant de Mlle Fong attendu que M. Quan Wing Yut et Mlle Fong ont été mariés et qu'aucune preuve digne de foi n'a été administrée prouvant qu'ils sont libre de se remarier.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

Appel d'un refus d'approuver la demande établie par Quan Wing Yut pour l'admission de Fong Choi Yee en conformité du Règlement établi selon la Loi sur l'immigration. La lettre de refus envoyé à Fong Choi Yee dit:

File No. 410-1-13324

27 February 1969

Madam Fong Choi Yee 281A Shun Ning Road 2nd Floor Kowloon

Dear Madam,

 $\qquad \qquad \text{This is with reference to your application for admission to Canada.}$ 

I wish to inform you that your application for admission to Canada is refused as you have not submitted any evidence that your husband is dead or legally presumed to be dead, that complies with the requirements of Regulation 36, Part I, Amended, of the Canadian Immigration Regulations.

It is your responsibility to notify your sponsor as to the reason for refusal.

I wish to advise that every possible consideration was given to your application before this decision was reached.

Yours very truly,

(Sgd.)
for/R.L. Wales,
Superintendent of Canadian Immigration.

WHK/gk

c.c. Officer-in-charge, C.I.C., Calgary, Alta. 858-CH Senior Appeals Officer, Admissions. CH-1-4416"

The sponsor was also sent a letter which reads as follows:

#### "REGISTE RED

858-CH

Mr. Quan Wing Yut P.O. Box 323 Crossfield, Alberta. 2nd Floor, Webster Bldg., 237 - 7th Ave., S.W. Calgary 2, Alta.

3 April 1969

Dear Sir:

This refers to your application for the admission to Canada of your fiancee, Fong Choi Yee, from Hong Kong, and in particular refers to our memorandum to you dated 8 March 1969.

As indicated in the above memorandum, your application was refused and the decision in this respect has been based on the following reasons:

FONG Choi Yee is not admissible to Canada because she is a person described in section 5(d) of the Immigration Act in that she admits having committed a crime involving moral turpitude namely that she gave false information in a sworn statement contrary to section 7, Chapter 214 of the Hong Kong Perjury Ordinances, and her admission to Canada has not been authorized by the Governor in Council.

You are not entitled to sponsor Fong Choi Yee for admission to Canada for permanent residence as your fiancee because both you and Fong Choi Yee were previously married and there is no credible evidence that you and Fong Choi Yee are now free to marry.

It is your responsibility to notify your sponsor as to the reason for refusal.

 $\,$  I wish to advise that every possible consideration was given to your application before this decision was reached.

Yours very truly,

(Sgd.)
For/R.L. Wales,
Superintendent of Canadian Immigration.

WHK/gk

c.c. Officer-in-charge, C.I.C., Calgary, Alta. 585-CH Senior Appeals Officer, Admissions. CH-1-4416"

Le répondant de cette personne a aussi reçu une lettre qui dit:

#### "REGISTERED

Mr. Quan Wing Yut P.O. Box 232 Crossfield, Alberta. 858-CH

2nd Floor, Webster Bldg. 237 - 7th Ave., S.W. Calgary 2, Alta.

3 April 1969

Dear Sir:

This refers to your application for the admission to Canada of your fiancee, Fong Choi Yee, from Hong Kong, and in particular refers to our memorandum to you dated 8 March 1969.

As indicated in the above memorandum, your application was refused and the decision in this respect has been based on the following reasons:

FONG Choi Yee is not admissible to Canada because she is a person described in section 5(d) of the Immigration Act in that she admits having committed a crime involving moral turpitude namely that she gave false information in a sworn statement contrary to section 7, Chapter 214 of the Hong Kong Perjury Ordinances, and her admission to Canada has not been authorized by the Governor in Council.

You are not entitled to sponsor Fong Choi Yee for admission to Canada for permanent residence as your fiancee because both you and Fong Choi Yee were previously married and there is no credible evidence that you and Fong Choi Yee are now free to marry.

You have both been asked to produce evidence that you are free to marry pursuant to the requirements of section 36 of the Immigration Regulations but you have failed to provide the required evidence consequently your fiancee is unable to comply with the requirements of section 36 of the Immigration Regulations.

You were fully advised as to your right to appeal this decision and it is noted that this action has already been taken.

A copy of this letter is being forwarded to your lawyer, Mr. Marlin L. Moore of the firm of Woolliams, Korman & Moore, Barristers and Solicitors, Calgary, Alberta.

Yours truly,

#### DISTRIBUTION:

Head, Immigration Appeal Unit, Ottawa. File CH-1-4416 Marlin L. Moore (Sgd.)
M. Diduck,
for Officer-in-Charge,
Canada Immigration Centre."

At the hearing of the appeal the appellant was not present but was represented by his counsel Mr. E.M. Wooliams, Q.C., M.P. Mr. A.F. LePitre appeared for the respondent.

Section 17 of the Immigration Appeal Board Act provides:

"17. A person who has made application for the admission into Canada of a relative pursuant to regulations made under the Immigration Act may appeal to the Board from a refusal to approve the application, and if the Board decides that the person whose admission is being sponsored and the sponsor of that person meet all the requirements of the Immigration Act and the regulations made thereunder relevant to the approval of the application or that there exist compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief, the application shall be approved, but an appeal under this section may be taken only by such persons and in respect of such classes of relatives referred to in the regulations as may be defined by order of the Governor in Council."

Section 19(2) of the Immigration Appeal Board Act reads as follows:

"19(2) Every appellant under section 11 or 17 shall be advised by the Minister of the grounds on which the deportation order was made or the refusal to approve the application for admission into Canada was based."

You have both been asked to produce evidence that you are free to marry pursuant to the requirements of section 36 of the Immigration Regulations but you have failed to provide the required evidence consequently your fiancee is unable to comply with the requirements of section 36 of the Immigration Regulations.

You were fully advised as to your right to appeal this decision and it is noted that this action has already been taken.

A copy of this letter is being forwarded to your lawyer, Mr. Marlin L. Moore of the firm of Wooliams, Korman & Moore, Barristers and Solicitors, Calgary, Alberta.

Yours truly,

#### DISTRIBUTION:

Head, Immigration Appeal Unit, Ottawa.

File CH-1-4416 Marlin L. Moore (Sgd.)
M. Diduck,
for Officer-in-Charge,
Canada Immigration Centre."

L'appelant n'était pas présent à l'audition de son appel mais était représenté par son conseiller Me E.M. Woolliams C.R., député. M. A.F. LePitre occupait pour l'intimé.

L'article 17 de la Loi sur la Commission d'appel de l'immigration stipule:

"17. Une personne qui a demandé l'admission au Canada d'un parent en conformité des règlements établis selon la Loi sur l'immigration peut interjeter appel à la Commission du refus d'approbation de la demande et, si la Commission juge que la personne dont l'admission a été parrainée et que le répondant de cette personne satisfont à toutes les exigences de la Loi sur l'immigration et des règlements établis sous son régime concernant l'approbation de la demande ou qu'il existe des motifs de pitié ou des considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial. la demande doit être approuvée; mais un appel aux termes du présent article ne peut être interjeté que par les personnes et qu'à l'égard des catégories de parents dont font mention les règlements, que le gouverneur en conseil peut définir par décret.

Article 19(2) de la Loi sur la Commission d'appel de l'immigration dit:

''19(2) Chaque appelant en vertu de l'article 11 ou de l'article 17 doit être avisé par le Ministre des The facts in this appeal may be summarized as follows:

On 25 August 1967 Quan Wing Yut, a Canadian citizen submitted an application for permanent admission to Canada of his fiancée, Fong Choi Yee, as a nominated immigrant. He submitted a Statutory Declaration also dated 25 August 1967 in support of his sponsorship of Fong Choi Yee. In his Statutory Declaration the sponsor stated in paragraph 14 "I have never met my fiancée. My grandmother in Hong Kong is arranging my marriage. We have exchanged letters once a month since 1956. We are not formally engaged". In his said application of 25 August 1967 Quan Wing Yut stated in block 17 that he had been married on 13 April 1930 and that his wife was deceased; the date of her decease being 10 May 1944. Quan Wing Yut had previously filed an application at Calgary, Alberta on 6 February 1956 for the admission of his wife, Quan Woo Yin, as a nominated immigrant. This 1956 application was processed and after investigation it was determined by the Immigration authorities that the person being sponsored under the name of Quan Woo Hong Yin was not in fact Quan Woo Hong Yin. The application of 6 February 1956 was refused. On 31 January 1963 Quan Wing Yut at Calgary, Alberta, again made application for the admission of his wife as a nominated immigrant. Her name in the application being given as Woo Hung Ying. Subsequently on 7 December 1964 Quan Wing Yut signed a Statutory Declaration adjustment statement in which he stated in block 5 that 'My wife ran away about 1944 and I have not heard from her since". In paragraph 10 of the said adjustment appears, inter alia, the following:

"In 1956 and again in 1963 I submitted an application for the admission to Canada of my wife but had a woman Fon Toy Yee assume her identity and appear in the Canadian Immigration Office in Hong Kong claiming to be Woo Hung Ying. I am not married to Fon Toy Yee and had her take my wife's identity in order to have her come to Canada so that I might marry her."

As stated above Quan Wing Yut made application for the admission of Fong Choi Yee as a nominated immigrant stating that she was his fiancée. In a Statutory Declaration dated 26 February 1969 Fong Choi Yee declared inter alia that:

"At the time of my original application to <u>Canada</u>, on the advice of my fiance Quan Wing Yut (Chinese) I took the identity of Woo Hung Ying (Chinese) and to assist in this, I obtained a Hong Kong identity card in Woo Hung Ying's name."

The Board finds that in accordance with Section 19(2) of the Immigration Appeal Board Act the appellant was properly advised by letter of refusal dated 8 March 1969 of the grounds of refusal. The appellant being a Canadian citizen has the right of appeal and Notice of Appeal was received and filed on 24 March 1969.

motifs sur lesquels se fonde l'ordonnance d'expulsion ou le refus d'approuver la demande d'admission au Canada."

Les faits dans cet appel se résument ainsi:

Le 25 août 1967 Quan Wing Yut, citoyen canadien, a présenté une demande d'admission permanente pour sa fiancée Fong Choi Yee, présentée comme immigrante nommément désignée. À la même date, il a présenté une déclaration statutaire au soutien de son parrainage à l'égard de Fong Choi Yee. À l'alinéa 14 de cette déclaration le répondant déclare "I have never met my fiancée. My grandmother in Hong Kong is arranging my marriage. We have exchanged letters once a month since 1956. We are not formally engaged". Dans sa demande du 25 août 1967 Quan Wing Yut a déclaré à la case 17 qu'il s'est marié le 13 avril 1930 et que son épouse est décédée; son décès remonte au 10 mai 1944. Le 6 février 1956 à Calgary, Quan Wing Yut avait déposé une demande pour l'admission de son épouse, Quan Woo Hong Yin présentée comme immigrante nommément désignée. Les autorités de l'immigration ont considéré et éxaminé cette demande faite en 1956 et ont conclu que la personne parrainée, désignée sous le nom de Quan Woo Hong Yin, n'était pas en fait Quan Woo Hong Yin: la demande du 6 février 1956 a été refusée. Le 31 janvier 1963, Quan Wing Yut fait à Calgary une demande d'admission pour son épouse présentée sous le nom de Woo Hung Ying à titre d'immigrante nommément désignée. Le 7 décembre 1964 Quan Wing Yut a signé une déclaration statutaire rectificative dans laquelle il déclare à la case 5: "My wife ran away about 1944 and I have not heard from her since." A l'alinéa 10 de cette déclaration rectificatrice, entre autres choses, apparaît ceci:

"In 1956 and again in 1963 I submitted an application for the admission to Canada of my wife but had a woman Fon Toy Yee assume her identity and appear in the Canadian Immigration Office in Hong Kong claiming to be Woo Hung Ying. I am not married to Fon Toy Yee and had her take my wife's identity in order to have her come to Canada so that I might marry her."

Comme nous l'avons mentionné auparavant Quan Wing Yut a rempli une demande d'admission de Fong Choi Yee est déclarée être sa fiancée. Dans une déclaration statutaire faite le 26 février 1969 Fong Choi Yee déclare inter alia:

"At the time of my original application to <u>Canada</u>, on the advice of my fiance Quan Wing Yut (Chinese) I took the identity of Woo Hung Ying (Chinese) and to assist in this, I obtained a Hong Kong identity card in Woo Hung Ying's name."

Counsel for the appellant submitted that Fong Choi Yee could not be considered to be a prohibited person for having sworm false Statutory Declarations. The first false declaration was made in 1957 and therefore as more than five years has elapsed this took her out of the prohibited class. In so far as the second alleged false Statutory Declaration of 7 November 1968 is concerned (Appeal record, page 13) this had been and was explained by Fong Choi Yee in a Statutory Declaration sworm on 26 February 1969 (Appeal Record, page 27).

Section 5(d) of the Immigration Act read is as follows:

- "5. No person, other than a person referred to in subsection (2) of section 7, shall be admitted to Canada if he is a member of any of the following classes of persons:
  - (d) persons who have been convicted of or admit having committed any crime involving moral turpitude, except persons whose admission to Canada is authorized by the Governor in Council upon evidence satisfactory to him that
    - (i) at least five years, in the case of a person who was convicted of such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who was convicted of such crime when he was under twenty-one years of age, have elapsed since the termination of his period of imprisonment or completion of sentence and, in either case, he has successfully rehabilitated himself, or
    - (ii) in the case of a person who admits to having committed such crime of which he was not convicted, at least five years, in the case of a person who committed such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who committed such crime when he was under twenty-one years of age, have elapsed, since the date of commission of the crime and, in either case, he has successfully rehabilitated himself."

In the Board's opinion the fact that more than five years have elapsed since the making of the false declaration in 1957 by Fong Choi Yee does not take her out of the prohibited classes unless and until Governor in Council authority is obtained to permit a person to be admitted to Canada. Furthermore the Statutory Declaration which she signed on 17 January 1968 is within the five year period set out in Section 5(d) of the Immigration Act. On this ground alone the Board finds that the letter of refusal to approve the appellant's application of 25 August 1967 is valid and made in accordance with the Immigration Act and regulations thereunder relevant to the approval of the application. It therefore dismisses the appeal in so far as the legality of the refusal of the application is concerned. It therefore becomes unnecessary to deal with the other ground raised at the appeal.

La Commission déclare qu'en conformité de l'article 19(2) de la Loi sur la Commission d'appel de l'immigration une lettre datée du 8 mars 1969 a avisé l'appelant des motifs sur lesquels se fondent le refus. L'appelant, citoyen canadien, a le droit d'interjeter appel et un avis d'appel a été reçu et déposé le 24 mars 1969.

Le conseiller de l'appelant a soutenu qu'on ne pouvait plus considérer que Fong Choi Yee appartenait à la catégorie interdite; elle y avait été placée pour fausse prestation de serment à l'égard des déclarations statutaires. La première fausse déclaration a été prêtée en 1956; depuis, plus de cinq ans se sont écoulés et ce délai suffit à la sortir de la catégorie interdite. Dans la déclaration statutaire prêtée sous serment le 26 février 1969 (page 27 du procès-verbal de l'enquête) Fong Choi Yee donne des explications sur ce qui a trait à la seconde fausse déclaration du 7 novembre 1968 (page 13 du procès-verbal de l'enquête).

Article 5(d) de la Loi sur l'immigration dit:

- "5. Nulle personne, autre qu'une personne mentionnée au paragraphe (2) de l'article 7, ne doit être admise au Canada si elle est membre de l'une des catégories suivantes:
  - (d) les personnes qui ont été déclarées coupables de quelque crime impliquant turpitude morale, ou qui admettent avoir commis un tel crime, excepté les personnes dont l'admission au Canada est autorisée par le gouverneur en conseil sur preuve, par lui jugée satisfaisante,
    - (i) qu'au moins cinq années, dans le cas d'une personne déclarée coupable d'un tel crime alors qu'elle était âgée de vingt et un ans ou plus ou au moins deux années, dans le cas d'une personne déclarée coupable d'un tel crime alors qu'elle avait moins de vingt et un ans, se sont écoulées depuis l'expiration de sa période d'emprisonnement ou l'achèvement de sa sentence et que, dans l'un ou l'autre cas, elle s'est réhabilitée avec succès, ou
    - (ii) que, s'il s'agit d'une personne qui admet avoir commis un tel crime dont elle n'a pas été déclarée coupable, au moins cinq années, dans le cas où elle a commis ce crime alors qu'elle était âgée de vingt et un ans ou plus, ou au moins deux années, dans le cas où elle a commis ce crime alors qu'elle avait moins de vingt et un ans, se sont écoulées depuis la date à laquelle le crime a été commis, et, dans l'un ou l'autre cas, qu'elle s'est réhabilitée avec succès;

La Commission estime que le fait que plus de cinq années se soient écoulées depuis la prononciation par Fong Choi Yee de la fausse déclaration en 1957 ne la retire pas de la catégorie interdite à moins et jusqu'à ce que le Gouverneur en Conseil autorise l'admission de Having dismissed the appeal on legal grounds, the Board then had to consider whether there exist such compassionate or humanitarian grounds which in its opinion warrant the granting of special relief.

The sponsor is a Canadian citizen of Chinese extraction who was born on 1 May 1911 and is now fifty-eight years old. He is in partnership in a cafe business in Crossfield, Alberta. His annual income is approximately \$2,000.00 per annum with his assets being approximately \$4,500.00. Mr. Quan Wing Yut has never seen Fong Choi Yee, the person whom he describes as his fiancée and who is a widow aged fifty-three years. His proposed marriage to Fong Choi Yee is stated to have been arranged by the appellant's grandmother. In the written argument submitted by appellant's counsel it is stated that Quan Wing Yut has maintained his fiancée in Hong Kong and has been sending her approximately \$30.00 a month since 1956 to the present time (pages 3 and 4, Argument). Nowhere in the evidence before the Board is this statement borne out. The only reference to monies being sent by the appellant to Fong Choi Yee is found in a letter dated 5 July 1968 (Appeal Record, page 22) wherein the appellant states inter alia that:

"Owing to the death of my Ex-wife Woo-Hang-Ying few years ago in the mainland China, on which I suffered very sadly in my life. Until last year when Miss Fong Choi Yee came to my dream who promised to marry with me, I did all my best to support her living in Hong Kong financially since that time."

In Exhibit R1, Page 7, is found the following:

"I have never met my fiancee. My Grandmother in Hong Kong is arranging my marriage. We have exchanged letters once a month since 1956. We are not formally engaged."

The evidence before the Board does not satisfy it that the appellant is, in fact, free to marry Fong Choi Yee if she should come to Canada. In view of his age, the age of Fong Choi Yee, the fact she is illiterate and has no knowledge of English, the small annual income of the appellant and the fact no evidence was adduced to show satisfactory settlement arrangements, the Board is of the opinion that such compassionate and humanitarian grounds do not exist as would warrant the granting of special relief. It does not approve the sponsorship application of 25 August 1967 made by Quan Wing Yut.

Dated at Ottawa, this 16th day of January 1970.

Concurred by:  $\cup$  Benedetti and J.A. Byrne.

For the appellant: E.M. Wooliams, Q.C.; For the respondent: A.F. LePitre, Esq.

cette personne au Canada. Par ailleurs, la déclaration statutaire qu'elle a signée le 17 janvier 1968 est dans le délai de cinq ans défini à l'article 5(d) de la Loi sur l'immigration. Pour ce seul motif, la Commission déclare que la lettre contenant le refus d'approuver la demande d'admission du 25 août 1957 est valide et faite en conformité de la Loi sur l'immigration et des règlements qui visent l'approbation de demande. En conséquence la Commission rejette l'appel en ce qui a trait à la légalité du refus de la demande en question. En conséquence il n'est pas nécessaire de traiter des autres motifs soulevés en appel.

Après avoir rejeté l'appel pour des motifs légaux, la Commission doit ensuite étudier la question de savoir s'il existe des motifs de pitié ou d'ordre humanitaire qui justifient, d'après elle, l'octroi d'un redressement spécial.

Le répondant est un citoyen canadien originaire de Chine; il est né le ler mai 1911 et est donc âgé de cinquante huit ans. Il dirige, en association, un café à Crossfield, Alberta. Son revenu annuel d'environ 2,000 dollars monte à 4,500 dollars avec ses biens. M. Quan Wing Yut n'a jamais vu Fong Choi Yee; cette personne présentée comme sa fiancée, est veuve et âgée de cinquante-trois ans. Il a été déclaré que ce mariage éventuel a été arrangé par la grand-mère de l'appelant. Dans la plaidoierie écrite du conseiller de l'appelant il est déclaré que Quan Wing Yut subvint aux besoins de sa fiancée à Hong Kong et que depuis 1956 il lui envoya 30 dollars par mois (pages 3 et 4 de la plaidoirie). La preuve ne supporte en aucune façon cette déclaration. Seule une lettre datée du 5 juillet 1968 (procès-verbal de l'enquête page 22) envoyée par l'appelant à Fong Choi Yee fait référence à de l'argent. Dans cette lettre l'appelant écrit, inter alia:

"Owing to the death of my Ex-wife Woo-Hang-Ying few years ago in the mainland China, on which I suffered very sadly in my life. Until last year when Miss Fong Choi Yee came to my dream who promised to marry with me, I did all my best to support her living in Hong Kong financially since that time."

La pièce à l'appui R1 (page 7) dit:

"I have never met my fiancee. My Grandmother in Hong Kong is arranging my marriage. We have exchanged letters once a month since 1956. We are not formally engaged."

D'après la preuve administrée devant la Commission celleci n'est pas convaincue que l'appelant est en fait libre de se marier avec Fong Choi Yee si elle pouvait venir au Canada. En raison de son âge, de celui de sa fiancée, du fait qu'elle est illettrée et qu'elle n'a aucune connaissance de la langue anglaise, du maigre revenu annuel de l'appelant et du fait qu'aucune preuve n'a été produite prouvant d'une façon satisfaisante l'établissement de dispositions relatives au mariage, la Commission estime qu'il n'existe pas de motifs d'ordre humanitaire ou de pitié qui justifieraient l'octroi d'un redressement spécial. Elle n'approuve pas le parrainage de la demande du 25 juillet 1967 présentée par Quan Wing Yut.

Fait à Ottawa le 16 janvier 1970.

Ont souscrit: U. Benedetti, et J.A. Byrne.

Pour l'appelant: Me E.M. Wooliams, c.r.

Pour l'intimé: M. A.F. LePitre.

24.
Giuseppe SERRATORE et uxor,

appellants,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 10, 1969; File: 69-859.

Coram: Jean-Pierre Houle, U. Benedetti, J.A. Byrne.

Jurisdiction - S.I.O. - nature of Section 23 report - review of immigration officer's assessment. - I.A. Bd. - nature of - relation to Department. - Immigration Act: 11(2)(3), 23, 37(1); Immigration Inquiries Regulations: 11; Immigration Appeal Board Act: 7, 11, 12, 14, 15.

Held: It is the Special Inquiry Officer, acting as a quasi-judicial tribunal, who determines the fate of a person seeking admission into Canada as a permanent resident, and he makes his determination or decision after he has conducted a full and proper inquiry.

In se and per se a Section 23 Report is nothing but an administrative document which activates an inquiry. But once the Section 23 Report is, pursuant to Section 7 of the Immigration Inquiries Regulations, filed as an exhibit at the start of an inquiry, it forms part of the inquiry and must be treated fully and properly by the Special Inquiry Officer since he is the one who has the authority to inquire into and determine whether a person shall be allowed to come into Canada or to remain in Canada or shall be deported, and he has to "do all other things necessary to provide a full and proper inquiry".

By statute the Special Inquiry Officer is given very wide powers and even a high degree of discretion; he functions as a quasi-judicial tribunal and since an appeal lies from his decision with the Board, the latter must, pursuant to Section 22 of its Act, satisfy itself and to pronounce on whether the Special Inquiry Officer considered the facts properly and fully and acted in accordance with the law in making an order of deportation.

By statute the Board is a Court of record (section 7); it is a Court of law with an appellate jurisdiction and a jurisdiction in equity (sections 11, 12, 14, 15); it is not an administrative arm of the Department of Manpower and Immigration and does not and cannot pronounce on the policies implemented by the Department; it cannot pronounce on whether the immigration laws are good or bad. It must render its decisions on the basis of evidence openly and properly tendered and in the light of circumstances surrounding each and every case. Ascertaining legislative intent is part of the process of the court. The intentions of Parliament in regard to the "Canadian Immigration laws" are that a person could apply for permanent residence either from abroad or whilst in Canada and in both cases the person must be treated equally.

The judgment of the Board was delivered by:

24. Giuseppe SERRATORE et uxor,

appelants,

v .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 10 décembre 1969; Dossier: 69-859.

Coram: Jean-Pierre Houle, U. Benedetti, J.A. Byrne.

Compétence - enquêteur spécial - nature du rapport prévu à l'article 23 - revision de l'appréciation du fonctionnaire à l'immigration.- C.A.I. - sa nature - ses liens avec le Ministère.-Loi sur l'immigration: 11(2)(3), 23, 37(1); Règlement sur les enquêtes de l'immigration: 11; Loi sur la Commission d'appel de l'immigration: 7, 11, 12, 14, 15.

Arrêt: C'est l'enquêteur spécial, lorsqu'il assume les fonctions d'un tribunal quasi-judiciaire, qui détermine le sort d'une personne qui demande l'admission au Canada comme résidant permanent et il doit donner sa décision à la suite d'une enquête complète et régulière.

En soi et par lui-même le rapport prévu à l'article 23 n'est qu'un document administratif qui donne lieu à une enquête. Mais une fois déposé comme pièce à l'appui au début d'une enquête, conformément à l'article 7 du Règlement sur les enquêtes de l'immigration, le rapport prévu à l'article 23 devient partie de l'enquête et il doit être considéré complètement et régulièrement par l'enquêteur spécial puisque c'est lui qui a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée et celui de statuer en l'espèce, et il doit "accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière".

La Loi attribue à l'enquêteur spécial une compétence très large et des pouvoirs discrétionnaires importants; il assume les fonctions d'un tribunal quasi-judiciaire et, puisque sa décision est en appel devant la Commission, celle-ci doit, en vertu de l'article 22 de la loi qui la gouverne, s'assurer, pour décider en la matière, que l'enquêteur spécial a considéré convenablement tous les faits et qu'il a agit conformément à la Loi lorsqu'il a rendu l'ordonnance d'expulsion.

La Commission est de par la Loi une cour d'archives (article 7); elle est aussi une cour de loi avec juridiction en appel et en équité. (articles 11, 12, 14, 15); elle n'est pas une section administrative du ministère de la Main-d'oeuvre et de l'Immigration et elle ne se prononce pas, elle ne peut d'ailleurs le faire, sur les

Appeal from an order of deportation made on April 23, 1969, against Giuseppe SERRATORE; his wife Giovanna, née Michienzi, has been included in the aforesaid order.

The order of deportation reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) in the opinion of an Immigration Officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1, Amended;
  - (b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part 1, Amended;
  - (c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1, Amended.

The above order is to include the dependent member of the family of Giuseppe Serratore, namely, his wife Giovanna Serratore, under the provisions of subsection (1) of Section 37 of the Immigration Act."

The appellants were not present and they were not represented by counsel at the hearing of their appeal which took place on December 9, 1969. The respondent submitted written submissions dated December 8, 1969. Pursuant to Section 18 of the Immigration Appeal Board Rules the Board has reviewed the Notice of Appeal and the record together with aforesaid written submission and the Board has rendered its decision thereon.

The appellant and his wife, aged 58 and 54 respectively, are both citizens of Italy; they entered Canada on December 8, 1968 and were granted the status of visitors for a period of three months; they applied

politiques du Ministère; elle ne peut décider si les lois de l'immigration sont bonnes ou mauvaises. Elle doit rendre ses décisions sur la base des preuves ouvertement et régulièrement présentées à la lumière des circonstances qui entoure chaque cas particulier. La vérification de l'intention du législateur fait partie de la procédure judiciaire. L'intention du Parlement en ce qui concerne les lois canadiennes de l'immigration est qu'une personne puisse demander la résidence permanente de l'étranger ou de l'intérieur du pays, et que la personne soit traitée également dans les deux cas.

Le jugement de la Commission fut rendu par:

#### Jean-Pierre Houle:

Appel d'une ordonnance d'expulsion rendue le 23 avril 1969 contre Guiseppe SERRATORE; son épouse Giovanna, née Michenzi, était incluse dans ladite ordonnance, qui est rédigée comme suit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) in the opinion of an Immigration Officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1, Amended;
  - (b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part 1, Amended;
  - (c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1, Amended.

The above order is to include the dependent member of the family of Giuseppe Serratore, namely, his wife Giovanna Serratore, under the provisions of subsection (1) of Section 37 of the Immigration Act."

for permanent residence three days before their status expired; they have two sons in Canada, one is a Canadian citizen, the other a landed immigrant since 1967, other children are still in Italy and one is in Australia. Mrs. Serratore has two brothers and one sister residing in Canada. The appellant has received five years of schooling and has been a farm laborer for most of his life.

On March 4, 1969, Mr. Serratore made an application for permanent residence in Canada, filed and signed the form prescribed by the Minister, Mr. Serratore was then examined by an Immigration Officer who made a Section 23 Report dated April 2, 1969. In the aforesaid report, the Immigration Officer says, inter alia:

"3. I am also of the opinion...

There are no ways or means to find out on what basis the applicant has been given 3 units for occupational demand and 3 units for occupational skill. The Immigration Officer in his Section 23 report says that he has made such an assessment "having given due regard to the information contained in his application which is attached and having assessed him in accordance with Schedule A of the Immigration Regulations..."

In relation to occupational demand, schedule A recites:

"(c) Occupational demand

On the basis of information gathered by the Department on employment opportunities in Canada, units to be assessed according to demand for the occupation the applicant will follow in Canada, ranging from fifteen when the demand is strong to zero when there is an oversupply in Canada of workers having the particular occupation of the applicant". (underlines are mine).

If one gives due regard to the information contained in the application made in the form prescribed by the Minister, one finds out in Box 11 "Intended occupation in Canada: Retired". Intended occupation, that is the occupation that the applicant will follow in Canada, and units have to be assessed according to the demand for that occupation, on the basis of information gathered by the Department. One wonders as to whether the Department has gathered information on the "occupation" of "retired" and as to whether "there is an oversupply in Canada of workers having the particular occupation of the applicant". To say the least, there is an antinomy between the "occupation" of "retired" and that of a worker. Does the publication or the booklet in which are contained the information gathered by the Department makes reference to the "occupation" of "retired". Who knows?

Les appelants n'assistaient pas et n'étaient pas représentés à l'audition de leur appel, qui a eu lieu le 9 décembre 1969. L'intimé a soumis des arguments écrits en date du 8 décembre 1968. En vertu de l'article 18 du Règlement sur la Commission d'appel de l'immigration, la Commission a étudié l'avis d'appel et le dossier ainsi que les arguments écrits sus-mentionnés et elle a fondé sa décision sur ces documents.

L'appelant et son épouse, âgés respectivement de 58 et de 54 ans, sont tous les deux citoyens d'Italie; ils sont entrés au Canada le 8 décembre 1968 et ils ont acquis le statut de visiteur pour une période de trois mois; ils ont demandé la résidence permanente trois jours avant l'expiration de leur statut; ils ont deux fils au Canada, dont l'un est citoyen canadien et l'autre immigrant reçu depuis 1967; ils ont d'autres enfants en Italie et un autre en Australie. Mme Serratore a deux frères et une soeur qui demeurent au Canada. L'appelant a cinq années de scolarité et il a été manoeuvre agricole pour la plus grande partie de sa vie.

Le 4 mars 1969, M. Serratore a fait une demande de résidence permanente au Canada, déposant le formulaire signé prescrit par le Ministre; M. Serratore a ensuite été examiné par un fonctionnaire à l'immigration qui a soumis le rapport prévu à l'article 23 en date du 2 avril 1969. Dans ce rapport, le fonctionnaire à l'immigration déclare entre autres, ceci:

"3. I am also of the opinion...

. . . 11

Il n'y a pas de moyen de trouver sur quoi on s'est fondé pour accorder au requérant trois points au titre des offres d'emploi et trois points par la compétence professionnelle. Le fonctionnaire à l'immigration déclare dans son rapport prévu à l'article 23 qu'il a donné cette appréciation "having given due regard to the information contained in his application which is attached and having assessed him in accordance with Schedule A of the Immigration Regulations..."

En ce qui concerne les offres d'emploi, l'annexe A indique ceci:

"c) Offres d'emploi dans la profession

Sur la base des renseignements recueillis par le Ministère sur les occasions d'emploi au Canada, les points doivent être attribués d'après le nombre de postes vacants dans la profession que le requérant compte exercer au Canada. L'échelle d'appréciation varie entre quinze points, si la demande est forte, et zéro points si les travailleurs qui exercent la même profession que le requérant sont en surnombre au Canada.

And one wonders again since the publication referred to above is classified by the Department as "restricted" or "secret" and since its production has constantly been opposed by the Department? In any event the Immigration Officer has to base his opinion having given due regard to the information contained in the application, and he has to assess duly and properly.

It has to be emphasized also that in Box 10 in the application form: "My present occupation is", the applicant has furnished the information: "Retired". Now, if one looks into Box 12: "I do not intend to work in Canada", which is subscribed by two XX, indicating the affirmative, and reads it in conjonction with and in sequence to information given in boxes 10 and 11, one becomes flabbergasted, especially in relation to assessment under occupational skill.

In relation to occupational skill, Schedule A recites:

#### "(d) Occupational skill

To be assessed according to the highest skill possessed by the applicant, ranging from ten units for the professional to one unit for the unskilled, irrespective of the occupation the applicant will follow in Canada."

If one admits, for the sake of argument, that somewhere in the Department's publication referred to supra, "retired" is defined or classified as an occupation, one has to ask: What degree of skill in "retirement" one has to achieve? Again, who knows? True, the assessment has to be made irrespective of the occupation the applicant will follow in Canada, but what comes if the applicant informs the Immigration Officer that he does not intend to work in Canada or in other words, that he does not intend to follow any occupation, except that of "retired"?

One must conclude that obviously the Immigration Officer did not make the assessment "having given due regard to the information contained in the application". And, if he did, he is manifestly wrong.

Following the receipt of the Section 23 Report, a special inquiry was held. Pursuant to Section 11 of the Immigration Act a Special Inquiry Officer "has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported", and for the purposes of the inquiry do all things necessary to provide a full and proper inquiry. Therefore it is the Special Inquiry Officer, acting as a quasi judicial tribunal, who determines the fate of a person seeking admission into Canada as a permanent resident, and he makes his determination or decision after he has conducted a full and proper inquiry.

Si l'on tient compte des renseignements contenus dans la demande faite sur le formulaire prescrit par le Ministre, on trouve à la question 11, "Intended occupation in Canada: retired". Intended occupation désigne la profession que le requérant compte exercer au Canada, et les points doivent être accordés selon le nombre d'emplois disponibles dans cette profession d'après les renseignements recueillis par le Ministère. On se demande si le Ministère a recueilli des renseignements sur la "profession" de "retraité" et si "les travailleurs qui exercent cette profession sont en surnombre au Canada". Il y a pour le moins une antinomie entre la "profession" de "retraité" et celle d'un travailleur. La publication ou la brochure qui contient ces renseignements recueillis par le Ministère mentionne-t-elle la "profession" de "retraité"? On se le demande aussi parce que la publication susmentionnée est classifiée comme "restreinte" ou "secrète" et puisque le Ministère s'est toujours opposé à sa distribution. De toute façon, le fonctionnaire à l'immigration doit fonder son opinion en tenant compte des renseignements contenus dans la demande et il doit donner une appréciation en bonne et due forme.

On doit souligner aussi qu'à la question 10 du formulaire de demande, "My present occupation is", le requérant a donné ce renseignement: "Retired". Si l'on regarde maintenant la question 12, "I do not intend to work in Canada", énoncé marqué de deux XX, ce qui signifie l'affirmative, et si l'on fait le lien avec les renseignements donnés à la question 10 et 11, on en demeure ahuri, surtout devant l'appréciation de la compétence professionnelle.

En ce qui concerne la compétence professionnelle, l'annexe A déclare ceci:

# "d) Compétence professionnelle

L'appréciation doit porter sur le plus haut degré de compétence que possède le requérant. L'échelle d'appréciation varie entre dix points pour un professionnel, et un point pour un non-spécialisé, quelque soit l'occupation que le requérant a l'intention d'exercer au Canada."

Si l'on admet, comme hypothèse, que la publication du Ministère dont il a été question définit ou classifie "retraité" comme profession, on peut se demander quel degré de compétence il faut atteindre dans la retraite. Encore là, qui sait? Il est vrai que l'appréciation doit être faite indépendamment de la profession que le requérant compte exercer au Canada, mais qu'est-ce qui arrive si le requérant déclare au fonctionnaire à l'immigration qu'il n'a pas l'intention de travailler au Canada, en autres mots, qu'il compte n'exercer aucune profession excepté celle de "retraité"?

On doit conclure que le fonctionnaire à l'immigration n'a évidemment pas fait l'appréciation "having given due regard to the information contained in the application". Si c'est ce qu'il a fait, il s'est manifestement trompé.  $\,$  At page 3 of the Minutes of the inquiry held in the present instance:

# By Special Inquiry Officer to person concerned:

"Mr. Serratore, a Report has been made under Section 23 of the Immigration Act which has just been read to you outlining the reasons why the Immigration Officer is of the opinion that you should not be granted landing in Canada. As a result of this Report it is now necessary that an Inquiry be held to determine whether you are a person who may be granted landing in Canada and in the event you are found not to be such a person an order shall be made for your deportation from Canada.

 ${\tt Q.}\,$  Do you understand why this Inquiry is being held? A. Yes, sir.

Should an order for your deportation from Canada be made, you have the right to appeal against such order.

Q. Do you understand?

A. Yes."

At the conclusion of the Inquiry, the Special Inquiry Officer made an order of deportation as recited supra, and it is from this order that an appeal lies with the Board pursuant to Section 11 and Section 22 of the Immigration Appeal Board Act.

The vital part of the order of deportation is in 3) (a):

"in the opinion of an Immigration Officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set in in Schedule A..."

In plain language the Special Inquiry Officer is saying: I have examined the opinion of the Immigration Officer as expressed in his Section 23 Report, filed as an exhibit to this inquiry, and on the basis of the evidence adduced at this inquiry, I have reached the decision that the Immigration Officer's opinion is sound, proper and valid, it becomes now a reason for my judgment and for that reason I order you to be deported.

In se and per se a Section 23 Report is nothing but an administrative document which activates an inquiry: "As a result of this Report it is now necessary that an Inquiry be held to determine whether..." But once the Section 23 Report is, pursuant to Section 7 of the Immigration Inquiries Regulations, at the commencement of an inquiry filed as an exhibit it forms part of the inquiry and shall be

treated fully and properly by the Special Inquiry Officer since he is the one who has the authority to inquire into and determine whether a person shall be allowed to come into Canada or to remain in Canada or shall be deported, and he has to "do all other things necessary to provide a full and proper inquiry" (Section 11(2)(3)(e) of the Immigration Act).

The only evidence adduced at the inquiry in regard to the appellant's occupation and skill is to be found at page 10 of the minutes:

By Special Inquiry Officer:

- "Q. After you left school, what did you do?
- A. I started to work on my farm.
- Q. Was this your own farm or your father's farm?
- A. Actually, the property was not ours, mine or my father's but we were working on it and taking care of the farm.
- Q. How long did you work at farming?
- A. I worked all my life until I came to Canada.

- Q. Were you ever employed in any other occupation other than farming?
- A. No.
- Q. Your occupation then is a farmer? Is that correct?
- A. Yes."

Nothing has been adduced through inquiry in regard to "present occupation", "intended occupation in Canada" or to the statement "I do not intend to work in Canada". Clearly the Special Inquiry Officer was satisfied that the appellant has been properly assessed and, in all probability, as a farm labourer; he merely assumed or even took for granted that the Immigration Officer has made his assessment having given due regard to the information contained in the application form. I have already held that manifestly the Immigration Officer did not do so and that there are no ways or means to find out on what basis the applicant has been given 3 units for occupational demand and 3 units for occupational skill. It should be noted that in its written submission, the Respondent has adduced nothing to enlighten the Board on the matter.

By statute the Special Inquiry Officer is given very wide powers and even a high degree of discretion; he is functioning as a quasi judicial tribunal and since an appeal lies from his decision with the Immigration Appeal Board, which has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including

Sur réception du rapport prévu à l'article 23, une enquête spéciale fut tenue. Aux termes de l'article 11 de la Loi sur l'immigration, l'enquêteur spécial "a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée, et celui de statuer en l'espèce" et de faire tout pour que l'enquête soit complète et régulière. C'est par conséquent l'enquêteur spécial, agissant comme tribunal quasi-judiciaire, qui détermine le sort d'une personne qui cherche à être admise au Canada comme résident en permanence, et l'enquêteur arrive à cette décision après avoir tenu une enquête complète et régulière.

À la page 3 du procès-verbal de l'enquête tenue dans l'instance, on peut lire ce qui suit:

"Mr. Serratore, a Report has been made under Section 23 of the Immigration Act which has just been read to you outlining the reasons why the Immigration Officer is of the opinion that you should not be granted landing in Canada. As a result of this report it is now necessary that an inquiry be held to determine whether you are a person who may be granted landing in Canada and in the event you are found not to be such a person an order shall be made for your deportation from Canada.

Q. Do you understand why this inquiry is being held? A. Yes, sir.

Should an order for your deportation from Canada be made, you have the right to appeal against such order.

Q. Do you understand?

A. Yes."

À la fin de l'enquête, l'enquêteur spécial a rendu l'ordonnance d'expulsion citée plus haut, et c'est cette ordonnance qui est en appel devant la Commission en vertu des articles 11 et 12 de la Loi sur la Commission d'appel de l'immigration.

La partie importante de cette ordonnance d'expulsion est le paragraphe  $3)\,(a):$ 

"in the opinion of an Immigration Officer you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set in Schedule A..."

En langage courant, l'enquêteur spécial dit ceci: "J'ai étudié l'<u>opinion</u> du fonctionnaire à l'immigration telle qu'elle est exprimée dans son rapport selon l'article 23, déposé comme preuve à l'appui à cette enquête et, sur la base de la preuve apportée à l'enquête, j'ai décidé que l'opinion du fonctionnaire à l'immigration est juste, régulière et valide, et je l'inclus comme raison de ma décision et pour cette raison j'ordonne votre expulsion.

En soi et par lui-même le rapport prévu à l'article 23 n'est qu'un document administratif qui donne lieu à une enquête: "As a result of this report it is now necessary that an Inquiry be held to determine whether...". Mais une fois que le rapport prévu à l'article 23 est déposé comme pièce à l'appui au début d'une enquête, conformément à l'article 7 du Règlement sur les enquêtes de l'immigration, il devient partie de l'enquête et l'enquêteur spécial doit le considérer complètement et régulièrement puisque c'est lui qui a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée, et celui de statuer en l'espèce; il doit "accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière" (article 11(2)(3)(e) de la Loi sur l'immigration).

La seule preuve apportée à l'enquête en ce qui concerne la profession de l'appelant se trouve à la page 10 du procès-verbal:

By Special Inquiry Officer:

- ''Q. After you left school, what did you do?
- A. I started to work on my farm.
- Q. Was this your own farm or your father's farm?
- A. Actually, the property was not ours, mine or my father's but we were working on it and taking care of the farm.
- Q. How long did you work at farming?
- A. I worked all my life until I came to Canada.

- Q. Were you ever employed in any other occupation other than farming?
- A. No.
- Q. Your occupation then is a farmer? Is that correct?
- A. Yes."

L'enquête n'a rien révélé sur la profession actuelle du requérant, la profession qu'il comptait exercer au Canada ou sur sa déclaration: "I do not intend to work in Canada". L'enquêteur spécial était nettement convaincu que l'appréciation de l'appelant, probablement comme manoeuvre agricole, avait été régulière; il a simplement supposé, et même pris pour acquis, que le fonctionnaire à l'immigration avait tenu compte, dans son appréciation, des renseignements contenus dans le formulaire de demande. J'ai déjà affirmé que le

question of jurisdiction, that may arise in relation to the making of an order of deportation, it is imperative for the Board, it is the duty of the Board to satisfy itself and to pronounce on whether the Special Inquiry Officer is considering the facts properly and fully and acting in accordance with the law in the making of an order of deportation.

In view of the above, could one say that the Special Inquiry Officer has done all things necessary to conduct a full and proper inquiry? To ask the question is to provide the answer, which is no and, therefore, for that reason the appeal should be allowed, and it is not necessary to pronounce on the other grounds of deportation.

The appellant's wife has been included in the order of deportation, and for all purposes, this is to order her to be deported. Once more an order of deportation is to be made by a Special Inquiry Officer at the conclusion of a full and proper inquiry. Mrs. Giovanna Serratore was called as a witness by the Special Inquiry Officer. She was not present while her husband was testifying and with respect to her the deportation order is based upon Section 37(1) of the Immigration Act which provides:

"37. (1) When a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it."

The foregoing Section was read to Mrs. Serratore, she was made aware of her right to counsel and she was asked if she wished to secure counsel and then the Special Inquiry Officer proceeded to question her. Could we say that the Special Inquiry Officer has complied with Section 11 of the Immigration Inquiries Regulations? That Section provides as follows:

"11. No person shall, pursuant to subsection (1) of Section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an Immigration Officer that he should not be so included."

Compliance with the foregoing section required that the person concerned be told that she has the right to an opportunity to establish that she should not be included in the order. This has been held by the Supreme Court of Canada in a very similar case as the present instance, the case of Smaro (Smaroula) Moshos and minor children -v- the Minister of Manpower and Immigration (unreported). In writing the reasons of the Court Mr. Justice Martland said: "In my opinion there was not a sufficient compliance with this section. The appellant's status at that inquiry was as a witness in an inquiry concerning John Moshos. She was not there throughout the inquiry... However, at no point was she told that she had the right of an opportunity to establish

fonctionnaire à l'immigration n'avait pas tenu compte de ces renseignements et qu'il n'y avait pas moyen de trouver sur quoi on s'était fondé pour accorder au requérant trois points au titre des offres d'emploi et trois autres points au titre de la compétence professionnelle. Soulignons que l'intimé n'a rien présenté dans son argument écrit pour éclairer la Commission à cet égard.

La loi attribue à l'enquêteur spécial une compétence considérable et même d'importants pouvoirs discrétionnaires; il exerce les fonctions d'un tribunal quasi-judiciaire et puisque sa décision est en appel devant la Commission d'appel de l'immigration, qui a compétence entière et exclusive pour décider des questions de fait et de droit, y compris la question de juridiction, que peut poser l'émission d'une ordonnance d'expulsion, il faut absolument que la Commission, et c'est là son devoir, puisse s'assurer, pour se prononcer en la matière, que l'enquêteur spécial a tenu compte convenablement de tous les faits et qu'il a agit conformément à la loi lorsqu'il a rendu l'ordonnance d'expulsion.

Dans ces circonstances, peut-on dire que l'enquêteur spécial a fait tout ce qui était nécessaire pour tenir une enquête complète et régulière? Poser la question fournit la réponse, qui est négative, et par conséquent l'appel devrait être accueilli pour ce motif et il n'est pas nécessaire de se prononcer sur les autres motifs d'expulsion.

L'épouse de l'appelant a été incluse dans l'ordonnance d'expulsion et, pour toutes fins pratiques, son expulsion a été ordonnée. Là encore, ce n'est qu'après une enquête régulière et complète que l'enquêteur spécial peut rendre une ordonnance d'expulsion. L'enquêteur spécial a appelé Mme Giovanna Serratore comme témoin. Elle n'assistait pas au témoignage de son mari et en ce qui la concerne l'ordonnance d'expulsion est fondée sur l'article 37(1) de la Loi sur l'immigration, qui prévoit ce qui suit:

"37(1) Lorsqu'une ordonnance d'expulsion est rendue contre le chef d'une famille, tous les membres à charge de la famille peuvent être inclus dans l'ordonnance et expulsés sous son régime."

Cet article a été lu à Mme Serratore; elle fut avisée de son droit à un avocat et on lui demanda si elle voulait se prévaloir de ce droit avant l'interrogatoire de l'enquêteur spécial. Peut-on dire que l'enquêteur spécial a respecté l'article 11 du Règlement sur les enquêtes de l'immigration? Cet article est rédigé comme suit:

'Nulle personne ne sera incluse dans une ordonnance d'expulsion, conformément au paragraphe (1) de l'article 37 de la loi, sans avoir eu d'abord l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas être incluse."

that she should not be included in the order. I do not regard the mere reading of S. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity. In my opinion the deportation order was made against the appellant and the children without complying with S. 11 of the Immigration Inquiries Regulations.... The appeal should, therefore be allowed and the deportation order, in so far as it relates to the appellant and the children, should be set aside."

The Board is not at liberty, in the present instance, to hold otherwise.

For all these reasons, the Board orders that the appeal of Giuseppe Serratore and his wife Giovanna be allowed and is hereby allowed.

In his written submission, counsel for Respondent has also said: "The Respondent submits that to give special consideration in this type of case would be unfair to those applying abroad in the proper manner, and could also defeat the intent of Canada's Immigration laws as they exist if encouraged or condoned".

By Statute the Immigration Appeal Board is a Court of record (Section 7 Immigration Appeal Board Act); it is a Court of law with an appellate jurisdiction and a jurisdiction in equity (Sections 11, 12, 14 and 15 of I.A.B.); it is not an administrative arm of the Department of Manpower and Immigration and it does not have to pronounce, it cannot pronounce on the policies implemented by the Department, it cannot pronounce on whether the immigration laws or regulations are good or bad. As a Court of law, the Board has to render its decisions on the basis of evidence openly and properly tendered and in the light of circumstances surrounding each and every case. The ascertainment of the legislative intent is part of the process of the court. The intentions of Parliament in regard to the "Canadian immigration laws" are that a person could apply for permanent residence either from abroad or whilst in Canada and in both cases the person has to be treated equally.

The last word in the matter could be left with Lord Loreburn in Nairm -v- University of St. Andrews (1909) A.C. 147 at 161: "From early times courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes so imperfect and obscure as they often are."

Dated at Ottawa this 16th day of January 1970.

Concurred in by: U. Benedetti and J.A. Byrne.

For the appellants: John Meren, Barrister and Solicitor;

For the respondent: F.D. Craddock, Esq.

La conformité à cette loi exige que la personne concernée soit avertie de son droit, à l'occasion, de prouver qu'elle ne doit pas être incluse dans l'ordonnance. La Cour suprême du Canada en a décidé ainsi dans un cas semblable à l'instance, l'affaire Smaro (Smaroula) Moshos c. le ministre de la Main-d'oeuvre et de l'Immigration (non publié). M. le juge Martland déclarait, dans les raisons de la décision: "In my opinion there was not a sufficient compliance with this section. The appellant's status at that inquiry was a witness at an inquiry concerning John Moshos. She was not there throughout the inquiry... However, at no point was she told that she had the right of an opportunity to establish that she should not be included in the order. I do not regard the mere reading of S. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity. In my opinion the deportation order was made against the appellant and the children without complying with S. 11 of the Immigration Inquiries Regulations... appeal should, therefore be allowed and the deportation order, in so far it relates to the appellant and the children, should be set aside."

La Commission ne peut décider autrement en l'instance.

Pour toutes ces raisons, la Commission ordonne que l'appel de Giuseppe Serratore et de son épouse Giovanna soit accueilli par les présentes.

Dans son argument écrit, l'avocat de l'intimé déclare ceci: "The respondent submits that to give special consideration in this type of case would be unfair to those applying abroad in the proper manner, and could also defeat the intent of Canada's Immigration laws as they exist if encouraged or condoned".

De par la loi, la Commission d'appel de l'immigration est une cour d'archives (article 7 de la Loi sur la Commission d'appel de l'immigration); elle est aussi une cour de justice avec une juridiction en appel et en équité (articles 11, 12, 14, 15 de la Loi sur la C.A.I.); elle n'est pas une section administrative du ministère de la Maind'oeuvre et de l'Immigration et elle n'a pas à se prononcer, d'ailleurs elle ne peut le faire, sur les politiques du Ministère et elle ne peut décider si les lois ou les règlements de l'immigration sont bons ou mauvais. En tant que cour de justice, la Commission doit rendre ses décisions sur la base de preuves ouvertement et régulièrement présentées et à la lumière des circonstances qui entourent chaque cas particulier. La vérification de l'intention du législateur fait partie de la procédure judiciaire. L'intention du Parlement en ce qui concerne les lois sur l'immigration est qu'une personne puisse demander la résidence permanente ou bien à l'étranger ou bien au Canada et que la personne soit traitée également dans les deux cas.

Le dernier mot à ce sujet pourrait être laissé à Lord Loreburn dans l'affaire Nairn c. University of St. Andrews (1909) A.C. 147 à 161: "From early times courts of law have been continuously obliged,

in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes so imperfect and obscure as they often are."

Fait à Ottawa, le 16 janvier 1970.

Ont souscrit: U. Benedetti et J.A. Byrne.

Pour les appelants: Me John Meren; Pour l'intimé: M. F.D. Craddock. 25. Alberto PUCCIARELLI,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 17, 1969; File: 69-691.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Assessment - review by the Board - Immigration Act: 5(t); Immigration Regulations: Schedule A, Part I.

<u>Held</u>: At the inquiry and at the hearing of the appeal, the appellant contended that he had been unjustly treated in his assessment, especially in regard to occupational skill, knowledge of English and French, and relatives. The Board has had to study the assessment.

Since he was only 21 years of age when he came to Canada and since he held a certificate of apprenticeship with only limited experience, the immigration officer was right in awarding him 5 units in regard to this item.

The Board must take into account that the inquiry has been held almost eight months after the arrival in Canada of the appellant and that during that period of time he has gained better knowledge of one or the other official language in Canada. He could not have been awarded more than one unit for his knowledge of English or French at the time of his examination.

The appellant was not awarded any unit in regard to relatives for he had no relatives in Canada at the time. Two of his brothers came to Canada later and, when the inquiry was held, the Special Inquiry Officer acknowledged the appellant's right to five additional units under this item but he was still five units short of the minimum requirement of 50.

The appellant was assessed according to the norms set out in Schedule A of the Regulations, Part I, because he had no relatives in Canada and he had stated and repeated at the inquiry that, although one of his brothers had come in as a non-immigrant and he had lost his own status, he wanted to file his application as an independent applicant.

The appellant was therefore judiciously examined and failed to obtain the required number of units.

The judgment of the Board was delivered by:

Gérard Legaré:

This is an appeal from an order of deportation made in Montreal on April 1st, 1969 by Special Inquiry Officer L.G. Rivard against the appellant, Alberto Pucciarelli, in the following terms:

25. Alberto PUCCIARELLI,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration;

intimé.

Date de la décision: le 17 décembre 1969; Dossier: 69-691.

Coram: Mlle J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Evaluation - revision par la Commission - Loi sur l'immigration: 5(t); Règlement sur l'immigration: Annexe A de la partie I.

Arrêt: Tant à son enquête qu'à l'audition de l'appel, l'appelant a prétendu que son évaluation ne lui donnait pas justice, notamment aux facteurs compétence professionnelle, connaissance de l'anglais et du français, et parenté. La Commission a dû analyser l'évaluation.

Comme il n'avait que vingt-et-un ans lors de son arrivée au Canada, et comme il n'était détenteur que d'un certificat d'apprenti avec une expérience limitée, l'attribution de 5 unités à ce facteur par l'officier d'immigration est appropriée.

La Commission se doit de tenir compte que l'enquête a été tenue près de huit mois après que l'appelant fut arrivé au pays et qu'au cours de ce laps de temps, il a évidemment accru ses connaissances de l'une ou l'autre des deux langues officielles du Canada. À son examen ses connaissances de l'anglais ou du français ne pouvaient lui valoir plus qu'une unité.

Au facteur de parenté l'appelant n'a reçu aucune unité parce qu'il n'avait alors aucun parent au Canada. Deux de ses frères sont venus par la suite et lors de la tenue de l'enquête, l'enquêteur spécial a reconnu que l'appelant pouvait bénéficier de 5 autres unités pour l'obtention du minimum requis de 50.

L'appelant fut évalué d'après les normes de l'annexe A des règlements, partie I, parce qu'il n'avait aucun parent au Canada, et à l'enquête, malgré l'arrivée au pays d'un frère possédant l'état de non-immigrant et après la perte de son propre état, il a dit et répété qu'il tenait à faire sa demande comme requérant indépendant.

L'appelant a donc été examiné judicieusement et n'a pu obtenir le nombre d'unités requises.

Le jugement de la Commission fut rendu par:

Gérard Legaré:

- "1) vous n'êtes pas un citoyen canadien:
- yous n'êtes pas une personne ayant acquis le domicile canadien;
- 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:
  - a) vous n'êtes pas en possession d'un visa d'Immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration:
  - b) votre passeport ne contient pas de certificat médical dûment signé par un médecin de notre ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration;
  - c) de l'avis d'un agent d'Immigration vous n'auriez pas été admis au Canada aux fins de résidence permanente si vous aviez présenté votre demande à l'extérieur du Canada selon l'alinéa (f) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration, ne pouvant vous conformer aux normes énoncées à l'Annexe "A" excluant le critère d'emploi réservé."

The appellant, age 20, was born in Italy, which country he left when he was three years old to emigrate to Uruguay with his parents. He has completed three years of primary schooling and six years of on the job technical training.

The appellant came to Canada on August 26 1968 and was granted a visitor's permit to expire on November 27, 1968 under section 7(1) (c) of the Immigration Act. On October 8, 1968 he filed an application for permanent residence which was refused when he failed to meet the minimum requirement of 50 units of assessment. The details of his assessment are as follows:

"(i)	"Instruction et formation	-13	unités
(ii)	Personnalité	- 7	unités
(iii)	Offres d'emploi dans la profession	- 3	unités
(iv)	Compétence professionnelle	- 5	unités
(v)	Âge	-10	unités
(vi)	Connaissance de l'anglais et du français	- 0	unité
(vii)	Parent	- 0	unité
(viii)	Offres d'emploi dans la région où se		
	trouve la destination	- 2	unités
	TOTAL	-40	unités

Appel d'une ordonnance d'expulsion rendue à Montréal le 1<sup>er</sup> avril 1969 par l'enquêteur spécial L.G. Rivard contre Alberto Pucciarelli, l'appelant. L'ordonnance d'expulsion se lit comme suit:

- "1) vous n'êtes pas un citoyen canadien;
  - vous n'êtes pas une personne ayant acquis le domicile canadien;
  - 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:
    - a) vous n'êtes pas en possession d'un visa d'Immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration;
    - b) votre passeport ne contient pas de certificat médical dûment signé par un médecin de notre ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration;
    - c) de l'avis d'un agent d'Immigration vous n'auriez pas été admis au Canada aux fins de résidence permanente si vous aviez présenté votre demande à l'extérieur du Canada selon l'alinéa (f) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration, ne pouvant vous conformer aux normes énoncées à l'Annexe "A" excluant le critère d'emploi réservé."

Âgé que de 20 ans, l'appelant est né en Italie, pays qu'il a quitté à l'âge de trois ans pour émigrer en Uruguay avec ses parents. Il a fait six ans d'école primaire et six ans d'apprentissage technique.

L'appelant est arrivé au Canada le 26 août 1968 et un permis de séjour lui fut accordé jusqu'au 27 novembre 1968 sous l'article 7(1)(c) de la Loi de l'Immigration. Le 8 octobre 1968, il déposait une demande d'admission permanente qui fut refusée parce qu'il n'a pu obtenir le nombre d'unités requises, soit un minimum de 50. Le partage des unités qui lui furent attribuées s'établit comme suit:

"(i) Instruction et formation

(ii) Personnalité

(iii) Offres d'emplois dans sa profession

(iv) compétence professionnelle

- 13 unités

- 7 unités

- 3 unités

- 5 unités

At the inquiry as well as at the hearing of his appeal, the appellant contended that he had been unjustly treated in his assessment, especially in regard to items 4, 6 and 7.

The units of assessment to be awarded in regard to item 4, occupational skill, are set out as follows in Schedule A of the Immigration Regulations, Part I:

# "(d) Occupational skill

To be assessed according to the highest skill possessed by the applicant, ranging from ten units for the professional to one unit for the unskilled, irrespective of the occupation the applicant will follow in Canada."

The appellant's application for permanent residence (form 0.S. 8) describes him as an electrical technician planning to follow this same occupation in Canada. The evidence shows that he has completed six years of primary schooling and six years of technical training. In regard to these six last years, he has stated as follows at the inquiry:

- "Q. Quelle université avez-vous fréquentée?
- R. Institut Technique, Mécanique et Electro-Technique.
- Q. Quel certificat avez-vous obtenu après avoir fréquenté cet Institut?
- R. J'ai le certificat d'apprenti mais j'ai manqué un examen d'anglais pour devenir technicien officiel dans la mécanique.
- Q. S'agissait-il d'une école technique ou d'une faculté technique à l'Université?
- R. Une école technique.
- Q. Combien d'années d'apprentissage avez-vous complétées?
- R. 6 ans.
- Q. Où avez-vous complété ces 6 années d'apprentissage?
- R. J'aimerais remarquer que je travaillais dans le jour et j'étudiais dans le soir. Ce qui concerne l'apprentissage, je faisais le travail dans le jour et j'étudiais dans le soir. Voulez-vous l'adresse exacte où la localisation de l'Institut où j'ai appris?
- Q. Quel était le lieu de travail, le nom, la place?
- R. La rue Agraciada, le nom de la place est Entrerios, Luxor, je travaillais avec des moteurs de bobine électrique et autres machines électriques. J'avais un autre travail avant çã, j'étais électro technicien robler et je faisais presque le même travail avec des moteurs, des générateurs électro technique. À l'âge de 12 ans j'ai aussi travaillé avec mon frère à réparer les motocyclettes, les scooters dans l'usine de mon frère.

	Age	- 10 unités
(vi)	Connaissance de l'anglais et du français	- 0 unité
	Parent	- 0 unité
(viii)	Offres d'emplois dans la région où se	
	trouve la destination	- 2 unités
	TOTAL	- 40 unités

Tant à son enquête qu'à l'audition de l'appel, l'appelant a prétendu que son évaluation ne lui donnait pas justice, notamment aux facteurs 4, 6 et 7.

Au facteur 4, compétence professionnelle, l'annexe A des Règlements de l'immigration, partie 1, établit comme suit les points d'appréciation à être attribués:

### "d) compétence professionnelle

L'appréciation doit porter sur le plus haut degré de compétence que possède le requérant. L'échelle d'appréciation varie entre dix points pour un professionnel, et un point pour un nonspécialisé, quelle que soit l'occupation que le requérant à l'intention d'exercer au Canada."

La demande de résidence permanente de l'appelant (formule 0.S.8) décrit ce dernier comme un électro technicien qui compte exercer cette même profession au Canada. La preuve démontre qu'il a fait six années d'école élémentaire et six années d'école technique. Au sujet de ces six dernières années il a déclaré ce qui suit à l'enquête:

- "Q. Quelle université avez-vous fréquentée? R. Institut Technique, Mécanique et Électro-Technique.
  - Q. Quel certificat avez-vous obtenu après avoir fréquenté cet Institut?
- R. J'ai le certificat d'apprenti mais j'ai manqué un examen d'anglais pour devenir technicien officiel dans la mécanique.
- Q. S'agissait-il d'une école technique ou d'une faculté technique à l'Université?
- R. Une école technique.
- Q. Combien d'années d'apprentissage avez-vous complétées?
- R. 6 ans.
- Q. Où avez-vous complété ces 6 années d'apprentissage?
- R. J'aimerais remarquer que je travaillais dans le jour et j'étudiais dans le soir. Ce qui concerne l'apprentissage, je faisais le travail dans le jour et j'étudiais dans le soir. Voulez-vous l'adresse exacte où la localisation de l'Institut où j'ai appris?

Q. Combien d'heures de travail faisiez-vous par jour et combien d'heures d'études faisiez-vous par jour à l'Institut?

R. De la première année à la quatrième il faut aller à l'école pendant le jour j'avais le soir ou pendant l'après-midi ou pendant le jour et je faisais l'alternation entre mon travail et mon école.

Q. Quelles étaient les heures de travail et les heures d'études les deux (2) dernière années?

R. J'étais à 7hrs du matin jusqu'à l'heure de l'après-midi pour l'école et les heures de travail n'étaient pas fixes je commençais à 2 heures jusqu'à 7 hrs le soir."

The evidence also shows that after having completed his education the appellant has worked for three or four moths as "mécanicien officiel" before coming to Canada. Since he was only 21 years of age when he came to Canada and since he was holding a certificate of apprenticeship with only limited experience, the Board is of the opinion that the Immigration Officer was right in awarding him 5 units in regard to this item.

The units of assessment to be awarded with regard to item 6, knowledge of English and French, are set out as follows in Schedule A of the Immigration Regulations, Part I:

- (g) Knowledge of English and French
  - (a) Ten units if the applicant reads, writes and speaks fluently both English and French;
  - (b) Five units if he reads, writes and speaks fluently one of the two languages;
  - (c) Four units for each of the two languages he speaks fluently and reads well;
  - (d) Two units for each of the two languages he speaks fluently;
  - (e) One unit for each of the two languages he speaks with difficulty;
  - (f) Two units for each of the two languages he reads well;
  - (g) One unit for each of the two languages he reads with difficulty."

The appellant testified as follows at the inquiry:

Q. Quel était le lieu de travail, le nom, la place?

R. La rue Agraciada, le nom de la place est Entrerios, Luxor, je travaillais avec des moteurs de bobine électrique et autres machines électriques. J'avais un autre travail avant ça, j'étais électro-technicien robler et je faisais presque le même travail avec des moteurs, des générateurs électro technique. A l'âge de 12 ans j'ai aussi travaillé avec mon frère à réparer les motocyclettes, les scooters dans l'usine de mon frère.

Q. Combien d'heures de travail faisiez-vous par jour et combien d'heures d'études faisiez-vous par jour à l'Institut?

R. De la première année à la quatrième il faut aller à l'école pendant le jour j'avais le soir ou pendant l'après-midi ou pendant le jour et je faisais l'alternation entre mon travail et mon école.

Q. Quelles étaient les heures de travail et les heures d'études les deux (2) dernières années?

R. J'étais à 7hrs du matin jusqu'à l'heure de l'après-midi pour l'école et les heures de travail n'étaient pas fixes je commençais à 2 heures jusqu'à 7 hrs le soir."

La preuve a aussi démontré qu'après avoir complété son éducation l'appelant a travaillé de trois à quatre mois comme "mécanicien officiel" avant de venir au Canada. Comme il n'avait que 21 ans lors de son arrivée au Canada et comme il était détenteur que d'un certificat d'apprenti avec une expérience limitée, la Commission est d'avis que l'attribution de 5 unités à ce facteur par l'officier d'immigration est appropriée.

Au facteur 6, connaissance de l'anglais et du français, l'annexe A des règlements de l'immigration, partie l dit ceci:

"g) connaissance de l'anglais et du français

 a) Dix points si le requérant lit, écrit et parle couramment l'anglais et le français;

b) Cinq points s'il lit, écrit et parle couramment l'une de ces deux langues;

 c) Quatre points pour chacune de ces deux langues qu'il parle couramment et lit avec facilité;

d) Deux points pour chacune de ces deux langues qu'il

parle couramment;

 e) Ûn point pour chacune de ces deux langues qu'il parle difficilement;

 f) Deux points pour chacune de ces deux langues qu'il lit avec facilité;

g) Un point pour chacune de ces deux langues qu'il lit difficilement."

Le témoignage de l'appelant à l'enquête révèle ce qui suit:

The appellant was not awarded any unit for at that time he had no relatives in Canada. Two of his brothers came to Canada later and when the inquiry was held, the Special Inquiry Officer acknowledged the appellant's right to five additional units under this item, but he was still five units short of the minimum requirement of 50.

As to items 1,2,3,5, and 8, the Board is of the opinion that the appellant was clearly awarded the appropriate number of units and that their is no evidence that the conclusions arrived at by the immigration officer who held the examination are manifestly wrong.

The appellant made his application for admission into Canada on October 9 1968 as an independent applicant and he was assessed according to the norms set out in Schedule A of the Immigration Regulations, Part I, because he had no relatives in Canada. When the inquiry was held, on april 1, 1969, the appellant had a brother who had come in two months before and had acquired immigrant status, but the appellant had by then lost all status and he has said and repeated that he wanted to file his application as an independent applicant.

### Page 12:

- Q. Aurait-il soumis une demande en vue de votre admission comme personne désignée. En d'autres mots, est-ce que Francesco aurait soumis une demande d'admission permanente pour vous?
- R. Dans le cas que je serais refusé il ferait tout pour m'avoir ici au Canada.
- Q. Est-ce que vous lui avez demandé de soumettre une demande en vue de votre admission permanente?
- R. Il voudrait m'aider mais je lui avais dit attendre à ce moment que j'aurais besoin de toi parce que je veux être indépendant de mon frère.
- Q. Présentement est-ce que vous désirez continuer cette demande d'admission permanente par vous-même à titre indépendant?
- R. Dans le cas que j'étais refusé comme indépendant, ma pétition était refusée je dirai que non, mais si je suis accepté oui."

At the hearing of his appeal, it is seen, at page 14 of the transcript of the hearing, that the appellant has confirmed that it was he who objected to applying for admission as a "nominated relative".

The appellant has admitted(page 14 of the minutes of inquiry) that he was not a Canadian citizen or a person having Canadian domicile. The evidence shows that the appellant had no immigrant visa and that his passport did not contain a medical certificate and since it has already been established that the appellant has been judiciously examined and that he failed to obtain the required number of units, the Board finds the order valid and dismisses the appeal.

### Page 10:

- Q. Monsieur Pucciarelli est-ce que vous lisez la langue anglaise?
- R. J'ai étudié trois ans d'anglais à l'Université mais je pense que je ne peux pas.
- Q. Pourriez-vous suivre une conversation qui se déroulerait devant vous entre deux autres personnes qui converseraient dans la langue anglaise?
- R. Je peux comprendre un peu mais pas tout.
- Q. Pourriez-vous recevoir des instructions techniques concernant votre travail, par un surveillant ou un patron qui ne s'exprimerait que dans la langue anglaise?
- R. Si la personne parle l'anglais et un peu lentement, je peux comprendre presque tout.
- Q. Est-ce que vous écrivez la langue anglaise?
- R. Non pas parfaitement seulement les choses élémentaires qu'on apprend à l'école, mais pas quelque chose concernant une conversation ou des livres.
- Q. Pourriez-vous écrire, même très simplement, quelques commentaires dans la langue anglaise dans votre travail. Pourriez-vous préparer une note technique concernant votre travail?
- R. Non pas entièrement."

#### Page 16:

- Q. Pourriez-vous établir quelles étaient vos connaissances de la langue française au mois de décembre 1968?
- R. Je vais vous souvenir que j'avais une année du français à l'école et j'étais ici au Canada depuis 2 mois à ce moment-là. Vous avez raison de dire que je ne parlais pas français mais j'avais une connaissance de la langue.

La Commission se doit de tenir compte que l'enquête a été tenue près de huit mois après que l'appelant fut arrivé au pays et qu'au cours de ce laps de temps, il a évidemment accru ses connaissances de l'une ou l'autre des deux langues officielles au Canada. La Commission ne croit pas qu'à son examen ses connaissances de l'anglais ou du français pouvaient lui valoir plus qu'une unité.

Au facteur 7, parents, l'annexe A des règlements de l'immigration, partie 1, dit ceci:

#### "h) Parent

Lorsque le requérant a au Canada un parent qui est prêt à l'aider à s'établir et qui, bien qu'il remplisse les conditions requises pour le parrainer, ou le désigner, n'est pas disposé ou n'est pas en mesure de le faire, Having dismissed the appeal under section 14 of the Immigration Appeal Board Act, the Board has received the case under section 15 of the same Act the relevant subsections of which are the following:

- "15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph(c) of section 14, it shall direct that the order be executed as soon as practicable except that
  - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
    - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
    - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board has found no motive to exercise its jurisdiction under this section. There is no evidence that the appellant has engaged any activity of a political nature and that he could be punished for such activity if he were deported. Further, there is no evidence that the appellant would suffer unusual hardship if he returned to his country where his parents, a brother and two sisters still live. The appellant has admitted that he has come into Canada as a visitor and that he had even obtained from his employer that his job be kept for him when he returned.

The appellant has admitted that he wanted to stay in Canada in order to make a better living, but the Board has held in the past that this motive alone could not justify the granting of special relief.

For these reasons, the Board orders that the deportation order be executed as soon as practicable.

Dated at Ottawa this 9th day of June 1970. Concurred in by: Miss J.V. Scott, Chairman and Jean-Pierre Houle.

For the appellant: Ersilio Pucciarelli, Esq., For the respondent: Jacques Pépin, Esq.

- a) cinq points si la destination du requérant est la municipalité où ce parent habite.
- b) trois points si sa destination n'est pas la municipalité où ce parent habite."

L'appelant n'a reçu aucune unité parce qu'il n'avait alors aucun parent au Canada. Deux de ses frères sont venus par la suite et lors de la tenue de l'enquête, l'enquêteur spécial a reconnu que l'appelant pouvait bénéficier de 5 unités sous ce facteur, mais qu'il était encore à court de 5 autres unités pour l'obtention du minimum requis de 50.

Pour ce qui est des facteurs, 1,2,3,5 et 8, la Commission est pleinement d'avis que l'appelant a reçu les unités appropriées, et qu'il n'a pas été prouvé que l'officer d'immigration qui a présidé à l'examen en soit arrivé à des conclusions manifestement erronées.

Lorsque l'appelant a soumis sa demande d'admission au Canada le 9 octobre 1968, il l'a fait en qualité de requérant indépendant et il a été apprécié d'après les normes de l'annexe A des règlements de l'immigration, partie I, parce qu'il n'avait aucun parent au Canada. Lors de la tenue de l'enquête, le ler avril 1969, l'appelant avait un frère arrivé deux mois plus tôt et qui possédait le statut d'immigrant, mais l'appelant avait alors perdu tout statut et il a dit et répété qu'il tenait à faire sa demande comme requérant indépendant.

# Page 12:

- Q. Aurait-il soumis une demande en vue de votre admission comme personne désignée. En d'autres mots, est-ce que Francesco aurait soumis une demande d'admission permanente pour vous?
- R. Dans le cas que je serais refusé il ferait tout pour m'avoir ici au Canada.
- Q. Est-ce que vous lui avez demandé de soumettre une demande en vue de votre admission permanente?
- R. Il voudrait m'aider mais je lui avais dit attendre à ce moment que j'aurais besoin de toi parce que je veux être indépendant de mon frère.
- Q. Présentement est-ce que vous désirez continuer cette demande d'admission permanente par vous-même à titre indépendant?
- R. Dans le cas que j'étais refusé comme indépendant, ma pétition était refusée je dirai que non, mais si je suis accepté oui."

À l'audition de l'appel, tel que rapporté à la page 14 du procès-verbal, l'appelant a confirmé qu'il s'était lui-même objecté à faire une demande d'admission comme "parent nommément désigné".

A la page 14 du procès-verbal de l'enquête, l'appelant a admis qu'il n'était pas citoyen canadien et qu'il n'avait pas de domicile canadien. La preuve a aussi été faite que l'appelant ne possédait pas de visa d'immigrant et que son passeport ne contenait pas de certificat médical et comme il a été établi précédemment que l'appelant avait été examiné judicieusement et qu'il n'avait pu obtenir le nombre d'unités requises, la Commission conclut en la validité de l'ordonnance et rejette l'appel.

Ayant rejeté l'appel sous l'article 14 de la Loi de la Commission d'appel de l'immigration, la Commission a étudié l'affaire sous l'article 15 de la même Loi dont les paragraphes appropriés se lisent comme suit:

- "15.(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
  - b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
    - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
    - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

La Commission n'a pu trouver de motifs l'autorisant à exercer sa juridiction sous cet article. Il n'a pas été prouvé que l'appelant a eu des activités d'un caractère politique et qu'il pourrait être puni pour de telles activités s'il était expulsé. Il n'y a plus aucune preuve que l'appelant pourrait être soumis à de graves tribulations s'il retournait dans son pays où demeurent encore ses parents ainsi qu'un frère et deux soeurs. De son propre aveu, l'appelant est venu au Canada comme visiteur et a même obtenu de son employeurs, avant son départ, qu'un emploi lui soit assuré à son retour.

L'appelant a bien admis qu'il désirait rester au Canada pour améliorer sa situation mais la Commission a déjà décrété que ce motif ne pouvait à lui seul justifier l'octroi d'un redressement spécial.

Pour ces raisons, la Commission ordonne que l'ordonnance d'expulsion soit exécutée le plus tôt possible.

Ottawa, le 12 février 1970.

Ont souscrit: M11e J.V. Scott, président, et Jean-Pierre Houle.

Pour l'appelant: M. Ersilio Pucciarelli; Pour l'intimé: M. Jacques Pépin. 26. Ampromfi Boateng BANDOH,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: February 13, 1970; File: 69-455.

Coram: Jean-Pierre Houle, Vice-Chairman, A.B. Weselak, J.A. Byrne.

Section 15 - best evidence not forwarded as to undertaking to return home - onus on Department to produce. - Immigration Appeal Board - nature of - Whether autonomous from Department. - Immigration Appeal Board Act: 15.

Held: The appeal is dismissed on law. As to Section 15 Immigration Appeal Board Act, the appellant admits that he undertook to return home, by a contract with the External Aid Office of Canada. The many questions which are fundamental to the making of a decision pursuant to Section 15 could have easily and satisfactorily been answered by producing best evidence, that is the contract or undertaking. The onus was on the respondent to produce it since he was alleging it. Best evidence not being produced, the Board had to rely on the evidence adduced and submissions made at the hearing.

Further, by statute, the Board is a court of record having jurisdiction in respect of certain matters relating to immigration; it is not an agency created for the implementation of programs or policies, and it does not constitute the administrative arm nor the legal arm of the Department or of any governmental agency.

The Judgment of the Board was delivered by:

Jean-Pierre Houle, Vice-chairman:

Appeal from an order of deportation made against Ampromfi Boateng BANDOH, on March 6, 1969.

The order of deportation reads as follows:

- "(1) you are not a Canadian citizen;
  - (2) you are not a person having Canadian domicle, and that:
  - (3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations, by reason of:

26. Ampromfi Boateng BANDOH,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 13 février 1970; Dossier: 69-455.

Coram: Jean-Pierre Houle, vice-président, A.B. Weselak, J.A. Byrne.

Article 15 - la meilleure preuve relative à l'engagement de l'appelant de retourner dans son pays n'a pas été produite - Le Ministère a la charge de la produire - Commission d'appel de l'Immigration - Si Commission autonome par rapport au ministère - Loi sur la Commission d'appel de l'Immigration: 15.

Arrêt: La Commission rejette l'appel pour un motif de droit. Quant à ce qui a trait à l'article 15 de la Loi sur la Commission d'appel de l'immigration l'appelant admet avoir signé un contrat passé entre le Bureau Canadien de l'aide extérieure et lui; par ce contrat il s'est engagé à retourner dans son pays. De plus, les nombreuses questions que la Commission se pose pour établir sa décision en vertu de l'article 15 auraient pu facilement recevoir une réponse entière en produisant la meilleure preuve: le contrat ou l'engagement. L'intimé avait la charge de le produire attendu qu'il a prétendu que cet engagement existait. La meilleure preuve n'ayant pas été produite la Commission doit s'appuyer sur la preuve faite et les plaidoiries présentées à l'audition.

De plus, en vertu d'un statut la Commission est une cour d'archive qui a compétence pour statuer sur certaines questions relatives à l'immigration; la Commission n'est pas un bureau créé pour l'exécution des programmes ou de la politique et elle ne constitue le bras ni administratif ni légal du Ministère ou de toute autre bureau gouvernemental.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle, vice-président:

Appel d'une ordonnance d'expulsion rendue le 6 mars 1969 contre Ampromfi Boateng BANDOH.

L'ordonnance d'expulsion dit:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile, and that:

- (a) paragraph (d) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by an Immigration Officer;
- (b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1."

The appeal was heard at Ottawa on January 8, 1970; the appellant being present. The respondent was represented by Mr. D. Bandy of the Department of Manpower and Immigration.

The appellant is a citizen of Ghana who came to Canada in 1958, under the auspices of the External Aid Office, an agency of the Government of Canada, now called the Canadian International Development Agency. He was enrolled in the University of Toronto, Faculty of Arts, and obtained a B.A. degree in 1961. He then entered 1st year medecine, but he failed and his award or scholarship was terminated. He sought and obtained permission to continue his studies at his own expense. In 1963-64 he enrolled in the University of Saskatchewan and pursued a three year course which he successfully, completed, obtaining a B.Sc., majoring in Biology. Because of financial difficulties he was unable to complete his master's degree. In July 1968, through his own efforts, he obtained employment with the Toronto General Hospital, Biochemistry Department, as a laboratory technician, where he is still employed on a full time basis. At the time of the hearing of the appeal, the appellant has obtained a certificate delivered by the Canadian Society of Laboratory Technologists, showing that he was qualified for registration in the technology of Clinical Chemistry. That goes for the academic and employment background of the appellant is so far as it is related to his sojourn in Canada.

Mr. Bandoh was admitted into Canada in 1958 under Section 7(1)(f) of the Immigration Act, for a period of one year.

- "7.(1) The following persons may be allowed to enter and remain in Canada as non-immigrants, namely
  - (f) Students entering Canada for the purpose of attending and, after entering Canada, while they are in actual attendance at any university or college authorized by statute or charter to confer degrees or entering Canada for and, after entering Canada, while they are actually taking some other academic, professional or vocational training approved by the Minister for the purposes of this paragraph;"

- (3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations, by reason of:
  - (a) paragraph (d) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by an Immigration Officer;
  - (b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1."

L'appelant était présent à son appel qui a été entendu le 8 janvier 1970. M. D. Bandy occupait pour le ministère de la Main-d'oeuvre et de l'immigration.

L'appelant est un citoyen du Ghana qui est venu au Canada en 1958 sous les auspices du Bureau de l'aide extérieure: un service du gouvernement du Canada, à présent appelé le Bureau canadien du developpement international. Inscrit à la faculté des Arts de l'Université de Toronto il a obtenu un B.A. en 1961. Ensuite il est entré en première année de médecine, mais il a échoué ce qui a mis fin à sa Il a demandé et obtenu la permission de continuer ses études à ses propres frais. En 1963-1964, inscrit à l'Université de Saskatchewan, il a suivi un cours de trois ans à la fin duquel il a obtenu un B.Sc., avec mention en biologie. A cause de difficultés financières il n'a pu achever sa maîtrise. En juillet 1968, de sa propre initiative, il a obtenu un poste de technicien de laboratoire au service de biochimie à Toronto General Hospital; il travaille encore à cet hôpital à titre d'employé à plein temps. A l'époque de son appel, Canadian Society of Laboratory Technologists, lui a délivré un certificat montrant qu'il est qualifié pour s'inscrire comme technicien en chimie clinique. Ceci en raison de ses connaissances académiques et de son expérience du travail dans la mesure ou celui-ci est relié à son séjour au Canada.

M. Bandoh a été admis au Canada pour une période d'un an à compter de 1958 en vertu de l'article 7(1)(f) de la Loi sur l'immigration.

"7.(1)	11	peut	êt re	pe rm	is aux	per	sonnes	su	ivantes	d'entrer
	et	de de	emeure	r au	Canad	a, à	titre	de	non-im	migrants,
	savoir									

The appellant received several extensions of his student's status, until October 1968. On December 5, 1968, Mr. Bandoh made an application for permanent admission into Canada: at page 11 of the Minutes of the inquiry held on March 6, 1969:

- By Special Inquiry Officer:
- "Q. -As the expiration of your temporary entry was on the 15 October 1968, why did you not approach the Canadian Immigration Office for an extension of your stay?
- A. -This was a complete oversight. By the time I realized that I had to renew or to see about my visa, or to see the Immigration Officer about my visa, it was passed the actual time. In other words, the time allowed me had expired. This was a complete oversight altogether. You see the passport is not something, honestly, that I use or carry around and when I put it away, honestly, I forgot about it for a long time.
- Q. -Mr. Bandoh, I have here Immigration Form 1008, Application for Permanent Admission by an Applicant in Canada, number 0056994, in the name of Ampromfi Boateng Bandoh, indication that you made application for permanent admittion to Canada on December 5, 1968. Would you have a look at this signature on this document and tell me if it is your signature?
- A. -Yes, I have a copy of that too.
- Q. -Do you admit that you applied for permanent admission to Canada after the expiration of the period of time for which you were allowed temporary entry?
- A. -Yes, I admit."

And at page 15 of the same Minutes:

- "Q. -Mr. Bandoh, did you make your application for permanent admission before the expiration of your period of temporary entry?
- A. -No I did not."

The main ground for the order of deportation is: "You did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by the Immigration Officer", (S.34(3)(d)) of the Immigration Regulations, Part I). It is abundantly clear that the appellant has contravened to the aforesaid section of the Regulations and it has been established also

(f) Les étudiants qui entrent au Canada pour fréquenter quelque université ou collège autorisé par statut ou charge à conférer des grades, et, après être entrés au Canada, pendant qu'ils fréquentent effectivement une telle université ou tel collège, ou qui y entre pour suivre, et, après y être entrés, pendant qu'ils suivent effectivement quelque autre cours de formation académique ou professionnelle, approuvé par le Ministre aux fins du présent alinéa;"

L'appelant a reçu plusieurs prorogations de son statut d'étudiant (jusqu'en octobre 1968). Le 5 décembre 1968, M. Bandoh a présenté une demande en vue de résider d'une façon permanente au Canada: page 11 du procès-verbal de l'enquête tenue le 6 mars 1969:

#### L'enquêteur spécial:

- "Q. -As the expiration of your temporary entry was on the 15 October 1968, why did you not approach the Canadian Immigration Office for an extension of your stay?
  - A. -This was a complete oversight. By the time I realized that I had to renew or to see about my visa, or to see the Immigration Officer about my visa, it was passed the actual time. In other words, the time allowed me had expired. This was a complete oversight altogether. You see the passport is not something, honestly, that I use or carry around and when I put it away, honestly I forgot about it for a long time.
  - Q. -Mr. Bandoh, I have here Immigration Form 1008, Application for Permanent Admission by an Applicant in Canada, number 0056994, in the name of Ampromfi Boateng Bandoh, indication that you made application for permanent admission to Canada on December 5, 1968. Would you have a look at this signature on this document and tell me if it is you signature?
  - A. -Yes, I have a copy of that too.
  - Q. -Do you admit that you applied for permanent admission to Canada after the expiration of the period of time for which you were allowed temporary entry?
  - A. -Yes, I admit."

# Et à la page 15 de ce procès-verbal:

- "Q. -Mr. Bandoh, did you make your application for permanent admission before the expiration of your period of temporary entry?
- A. -No I did not."

that he is not in possession of a valid and subsisting visa issued by a visa officer as required by subsection (1) of Section 28 of the Immigration Regulations, Part I. Therefore the order of deportation made against Mr. Bandoh is legal and valid and the appeal should be dismissed.

Having disposed of the appeal in pursuance of Section 14 of the Immigration Appeal Board Act, the Board has now to consider whether the instant case falls under Section 15 of the aforesaid Act, which section gives to the Board discretion in the exercise of a jurisdiction in equity.

As it has been said supra, the appellant came to Canada in 1958 under the auspices of the External Aid Office, an agency of the Government of Canada, as part of the overall Canadian external aid program and more particularly as part of the assistance offered to the recently independent country of Ghana. Before leaving his country, Mr. Bandoh would have signed a document, an undertaking, a contract as a recipient of an award or scholarship or stipend. Indeed Mr. Bandoh has admitted at the hearing that he has made an undertaking, that he has signed a contract (at pp.6, 13, 25 of the Transcript of evidence). One may add that it is in the nature of things that an undertaking or a contract has intervened, in the circumstances. Another "commencement de preuve par écrit" can be found in a letter dated April 23, 1969 from W.A. Monaghan, Acting Director, Training Division, Canadian International Development Agency, to J.T. Pasman, Appeals Officer, Department of Manpower and Immigration. (Copy of this letter has been put on file and was introduced as an exhibit in this case at p.3 of the transcript). The third paragraph of the letter reads: "One of the candidates for a Canadian award was Mr. Boateng-Bandoh who was then 22 years old and was teaching biology in a secondary school in Accra. On June 7, 1958, he signed an application from which stated in part: "If accepted for a Training Award, I undertake to ... return to my home country at the end of my course of study or training." This application form was approved by the Government of Ghana and he was admitted to the University of Toronto in September, 1958.

Mr. Bandoh admits that he has undertook to return home, that he has contracted an obligation to return home, but exactly at what time? The afore quoted letter says that "he signed an application form which stated in part: "If accepted for a Training Award, I undertake to ... return to my home country at the end of my course of study or training." The suspension points after the words "I undertake to" are disturbing because it would seem that the undertaking was assorted with other conditions which may qualified the undertaking. For instance, what does the phrase "course of study or training" mean? Does it refer to any kind of study or training or training in a specific field or discipline? What is the meaning of the word "end"? Does it mean at the end of a successfully completed course or should one infer that a failure at any given time of the training is tantamount to the

Le motif primordial de l'ordonnance d'expulsion est le suivant: "You did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by the Immigration Officer", (S.34(3)(d) of the Immigration Regulations, Part 1). Il est manifeste que l'appelant a contrevenu aux dispositions de l'article ci-dessus cité et il a été établi qu'il ne possédait pas de visa valide et non-périmé délivré par un préposé aux visas comme le prescrit l'alinéa (1) de l'article 28 du Règlement sur l'immigration, Partie I. En conséquence, l'ordonnance d'expulsion rendue contre M. Bandoh est légale et valide et l'appel devrait être rejeté.

La Commission après avoir décidé de cet appel en conformité de l'article 14 de la Loi sur la Commission d'appel de l'immigration, maintenant étudie si cette affaire tombe sous le régime de l'article 15 de la Loi citée ci-dessus; ledit article donne à la Commission discrétion dans l'exercice de sa juridiction d'équité.

Comme il a été dit plus haut, l'appelant est venu au Canada en 1958 sous les auspices du Bureau de l'aide extérieure, un service du gouvernement canadien dans l'ensemble du programme canadien d'aide extérieure et plus particulièrement dans le plan d'assistance offerte au nouveau pays indépendant de Ghana. Avant de quitter son pays, M. Bandoh aurait signé un document, un engagement, un contrat à titre de bénéficiaire d'une récompense, d'une bourse ou d'un traitement. En effet, à l'audition M. Bandoh a admis avoir pris un engagement, à savoir qu'il a signé un contrat (pp. 6, 13 et 25 de la transcription de la preuve). On peut ajouter que dans les circonstances, il est naturel qu'un tel contrat ait été établi. Un autre "commencement de preuve par écrit" peut être trouvé dans la lettre datée du 23 avril 1969 de W.A. Monaghan à J.T. Pasman, agent d'appel, Ministère de la Main-d'oeuvre de l'Immigration. (Une copie de cette lettre a été versée au dossier et introduite en pièce à l'appui, dans ce cas, à la page 3 de la transcription). Le troisième paragraphe de la lettre dit: "If accepted for a Training Award, I undertake to ... return to my home country at the end of my course of study or training." Le gouvernement du Ghana a accepté cette demande, et en septembre 1958 l'appelant a été admis à l'Université de Toronto.

M. Bandoh admet, s'être engagé à retourner dans son pays, avoir contracté l'obligation de retourner chez lui mais quand doit-il le faire? La lettre mentionnée ci-dessus dit: "he signed an application form which stated in part: "If accepted for a Training Award, I undertake to ... return to my home country at the end of my course of study or training." Les points de suspension n'amènent pas de clarté sur le sens de l'expression "I undertake to"; au contraire ceux-ci semblent indiquer que des conditions s'ajoutent à l'engagement pour le qualifier. Que signifie, par exemple, l'expression "course of study or training"? Réfère-t-elle à toutes sortes d'études ou cours de formation dans un domaine particulier ou spécifique? Que veut dire le mot "end"?

end of such training? Does the termination of the stipend or the award is tantamount to the termination of the alleged contract? All questions and others which are fundamental to the making of a decision pursuant to Section 15 could habe been answered easily and satisfactorily by producing the best evidence, that is the contract or the undertaking. Surely this document was available to the Respondent and the onus of producing it was on him since it is he who is allenging that contract in order to submit that Section 15 of the Immigration Appeal Board Act should not apply in the present case. The appellant had the onus of proving that he was not within the prohibited class described in the Section 23 Report and in the order of deportation; he has failed to do so and therefore, as already said, his appeal should be dismissed.

The best evidence being not produced, the Board has to rely upon the evidence adduced and the submission made at the hearing, which show:

#### 1) that the appellant:

- a) came to Canada in 1958, the recipient of an award granted in accordance with an agreement between the government of Canada and the government of Ghana;
- b) came to Canada to be trained in medecine with the ultimate goal of becoming a medical doctor; the appellant's testimony in that regard is confirmed by his actual enrollement in the Faculty of Medecine of the University of Toronto and by the letter, introduced as an exhibit to the hearing, from the Canadian Development Agency: "Our interest in Mr. Boateng-Bandoh dates back to 1958. At that time the Government of Canada offered to assist the recently-independent country of Ghana by financing the education of two Ghanaian students in Canadian medical schools... One of the candadates for a Canadian award was Mr. Boateng-Bandoh... His application was approved by the Governments of Ghana and Canada and he was admitted to the University of Toronto in September 1958."
- c) he failed his first year of medical studies and was not allowed by the University to re-try that year and for that reason the Canadian Agency terminated the award;
- d) was authorized to continue his studies at his own expenses and actually did so despite financial hurdles obtaining a B.Sc., (majoring in Biology) and being now certificated by the Canadian Society of Laboratory Technologists, as a qualified Registered Technologist;

Signifie-t-il à la fin d'un cours réussi ou doit-on inférer qu'un échec qui intervient à n'importe quel époque du cours de formation équivaut à la fin d'un tel cours de formation? Est-ce que la cessation du versement du traitement ou de la bourse équivaut à la fin du prétendu contrat? Pour l'établissement de la décision conformément à l'article 15 toutes ces questions et bien d'autres sont fondamentales et elles auraient pu recevoir une réponse en produisant la meilleure preuve, à savoir le contrat ou l'engagement. Certainement ce document était à la disposition de l'intimé lequel avait la charge de soutenir que dans cette affaire l'article 15 de la Loi sur la Commission d'appel ne devait pas être appliqué. L'appelant avait la charge de prouver qu'il n'appartenait pas à la catégorie interdite décrite dans le rapport prévu à l'article 23 et dans l'ordonnance d'expulsion; ne l'ayant pas prouvé, son appel doit être rejeté comme il l'a déjà été dit.

La meilleure preuve n'ayant pas été faite, la Commission doit donc considérer la preuve et la plaidoirie faite à l'audition; cellesci montrent:

### 1) que l'appelant:

- a) est venu au Canada en 1958, bénéficiaire d'une récompense décernée selon un accord passé entre le gouvernement du Canada et le gouvernement du Ghana;
- b) est venu au Canada pour y suivre un cours de formation en médecine afin de devenir docteur en médecine; le témoignage de l'appelant à cet égard est confirmé par son inscription à la faculté de Médecine de l'Université de Toronto et par la lettre du Canadian Development Agency introduite comme pièce à l'appui à l'audience: "Our interest in Mr. Boateng-Bandoh dates back to 1958. At that time the Government of Canada offered to assist the recently-independent country of Ghana by financing the education of two Ghanaian students in Canadian medical schools... One of the candidates for a Canadian award was Mr. Boateng-Bandoh... His application was approved by the Governments of Ghana and Canada and he was admitted to the University of Toronto in September 1958."
- c) n'a pas réussi la première année de médecine et n'a pas été autorisé à reprendre cette année et pour cette raison le Bureau canadien a cessé de lui verser une bourse;
- d) a reçu l'autorisation de poursuivre ses études à ses propres frais ce qu'il a fait en dépit des difficultés financières et a obtenu un B. Sc. (mention en biologie) et il est à présent reconnu par the Canadian Society of Laboratory Technologists, comme un technicien compétent.

- e) has obtained employment with and is still employed by the Toronto General Hospital (permanent staff) as a laboratory technician); it should be noted that it has been established at the inquiry that the appellant has taken employment without the written permission of an officer of the Department thus violating the Immigration Regulations, but such a violation was not made a ground in the order of deportation;
- f) has undertook, and he admits the undertaking, to return to Ghana at the end of his studies;
- g) has continuously maintained and is maintaining that his goal is still to do and complete his medical studies and his pretention is sustained by the actual studies he has already and successfully achieved and by his endeavour to be admitted to the professional course in Medicine at the University of Western Ontario, London, Canada, at the pre-medical level;
- h) if allowed to continue his studies, would be in a financial position to do so;
- i) has received no request from his own government to return and make use of the knowledge that he has gained thus far;
- j) has repeatedly affirmed that his intention is to return to his country at the end of his medical studies.

### 2) That the respondent

- a) having alleged a contractual obligation on the part of the appellant, has failed to determine the nature, the scope and the limits of that obligation;
- b) has submitted that after a lapse of almost twelve years, a moral obligation, to return to his country and serve, has been superimposed on the alleged contractual obligation;
- c) has suggested that a doubt could be entertained "as to the actual long-range views of the appellant, whether he does intend to return or does intend to remain in Canada and continue in research field" (at page 32 of the transcript of evidence);
- d) has indicated that some \$12,000. has been expended on his behalf by the Canadian government; no evidence has been adduced to support this figure nor as to the period of time it would have been expended;

- e) a obtenu un emploi et est encore employé par Toronto General Hospital (employé permanent en tant que technicien de laboratoire); remarquons que l'enquête a établi que l'appelant a obtenu un emploi sans la permission écrite d'un fonctionnaire du Ministère, ainsi M. Bandoh a contrevenu au Règlement sur l'immigration, mais ceci n'a pas motivé l'ordonnance d'expulsion;
- f) s'est engagé, (et admet cet engagement,) à retourner au Ghana à la fin de ses études;
- g) a toujours maintenu que son dessein est de terminer ses études en médecine, et cette affirmation est soutenue par le fait qu'il a réussi une partie des études médicales qu'il poursuit ainsi que par son effort pour être admis au niveau pré-médical du cours professionnel de l'Université de Western Ontario, à London;
- h) s'il recevait l'autorisation de poursuivre ses études, sa situation financière lui permettrait d'étudier;
- i) n'a reçu de son gouvernement aucune requête lui enjoignant de retourner dans son pays et d'y utiliser ses connaissances acquises;
- j) a sans cesse affirmé que son intention est de retourner dans son pays à la fin de ses études en médecine.

## 2) Que l'intimé:

- a) ayant soutenu que l'appelant est lié par une obligation contractuelle a omis de déterminer la nature, la portée et les limites de cette obligation;
- b) a soutenu qu'après l'écoulement d'une période de presque douze ans, l'obligation morale de retourner dans son pays et d'y servir, vient s'ajouter à la prétendue obligation contractuelle;
- c) a suggéré qu'un doute peut naître de la phrase suivante: "as to the actual long-range views of the appellant, whether he does intend to return or does intend to remain in Canada and continue in research field" (à la page 32 de la transcription de la preuve);
- d) a indiqué que le gouvernement canadien a dépensé quelques 12,000 dollars pour l'appelant; aucune preuve n'a été introduite au support de cette somme d'argent, non plus quant à l'époque pendant laquelle cette somme aurait été dépensée;

- e) has submitted that the government policy under the Canadian International Development Agency "should be respected and protected by any Canadian government agency or body, government appointed body, such as the Board. If the Board were to permit the appellant... to remain in Canada against the wishes (sic) of his contract he entered into with the Canadian International Development Agency, then the Board itself is being used as an instrument to defeat one of the major part of Canada's external aid program... the Board is certainly not designed to overlook or bypass Canadian Government policy unless these circumstances are extremely extenuating"; (at page 31 of the transcript of evidence).
- f) in conclusion, and having admitted (at page 29) that the order of deportation is founded on technical breaches of the Immigration Act and Regulations, (the respondent) has submitted that there are no circumstances in the instant case warranting the granting of special relief pursuant to Section 15 of the Immigration Appeal Board Act.

By statute the Immigration Appeal Board is a court of record having in all matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges which are vested in a superior court of record; the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation, and a person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact. The Board may dispose of an appeal by allowing it or dismissing it and it is only where the Board dismisses an appeal against an order of deportation that it may exercice its discretion or its jurisdiction in equity (SS. 7, 22, 11, 14, 15, Immigration Appeal Board Act).

As a court, the Board has a totally independent status and its most sacred duty is to ensure the triumph of justice in each individual case, basing its judgments on evidence properly and openly tendered. By statute the Board is a court of record having jurisdiction in respect of certain matters relating to immigration; it is not an agency created for the implementation of programs or policies, it does not constitute the administrative arm nor the legal arm of the Department or of any government's agency. It is as preposterous to advance that in exercising its jurisdiction "the Board itself is being used as an instrument to defeat one of the major parts of Canada's external aid program" as it is to suggest "that the Board is certainly not designed to overlook or bypass Canadian government policy unless (these)circumstances are extremely extenuating."

- e) a soutenu que la politique du gouvernement à l'égard du Bureau canadien du développement international "should be respected and protected by any Canadian government agency or body, government appointed body, such as the Board. If the Board were to permit the appellant... to remain in Canada against the wishes (sic) of his contract he entered into with the Canadian International Development Agency, then the Board itself is being used as an instrument to defeat one of the major part of Canada's external aid program... the Board is certainly not designed to overlook or bypass Canadian Government policy unless these circumstances are extremely extenuating"; (page 31 de la transcription de la preuve).
- f) en conclusion après avoir admis (à la page 29) que des infractions techniques de la Loi sur l'immigration et du Règlement fondent l'ordonnance d'expulsion, (l'intimé) a soutenu que dans cet appel aucune circonstance ne justifie l'octroi d'un redressement spécial prévu par l'article 15 de la Loi sur la Commission d'appel de l'immigration.

En vertu d'un statut, la Commission est une cour d'archives elle a en ce qui concerne toutes les questions nécessaires ou appropriées à l'exercice régulier de sa compétence tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archive la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion; et la personne contre qui a été rendue une ordonnance d'expulsion aux termes des dispositions de la Loi sur l'immigration peut, en se fondant sur un motif d'appel qui implique une question de droit et de fait ou une question mixte de droit et de fait, peut interjeter appel à la Commission. La Commission peut statuer sur un appel en l'admettant ou en le rejetant et c'est seulement lorsque la Commission rejette un appel d'une ordonnance d'expulsion qu'elle peut exercer sa discrétion ou sa juridiction d'équité (Art. 7, 22, 11, 14 et 15 de la Loi sur la Commission d'appel de l'immigration).

En tant que cour, la Commission a un statut totalement indépendant et son devoir le plus sacré est, compte tenu de chaque cas particulier, d'assurer le triomphe de la justice, et ceci en fondant son jugement sur la preuve régulièrement et ouvertement administrée. Un statut fait de la Commission une cour d'archives dont la juridiction s'étend à certaines questions relatives à l'immigration; ce n'est pas un bureau créé pour l'exécution des programmes ou de la politique, elle ne constitue le bras ni administratif ni légal du Ministère ou de tout autre bureau gouvernemental. Il est aussi irrationnel d'avancer que quand elle exerce sa juridiction "the Board itself is being used as an instrument to defeat one of the major parts of Canada's external aid program" que de proposer "that the Board is certainly not designed to overlook or bypass Canadian government policy unless (these) circumstances are extremely extenuating."

The appellant came to Canada to pursue and complete medical studies and it seems strange indeed that after almost twelve years he has not achieved his goal. However, in my opinion, it could hardly be said that this is the result of procrastination on the part of the appellant. It should be underlined that after failure of his first semester at the faculty of medecine, which failure terminated the scholarship, the appellant has been authorized by the Canadian authorities to continue his studies on his own, at his own expenses and that actually he did so with some degree of success since he is presently qualified to re-enter university at the pre-med level, although he has encountered financial difficulties throughout.

At this meetings with immigration authorities and during his testimony given under oath, the appellant has reiterated that his ultimate goal has always been and still is to become a medical doctor and then return to his own country, completing his internship right there. Surely the appellant has used had judgment in making an application for permanent residence instead of asking in due time for a renewal or a prolongation of his student's status but Section 34(1)(a) has not been held against him; the order of deportation bears that he has made an application for permanent residence after the expiry of his authorized stay in Canada. appellant is not a public charge and it is unlikely that he could become one and since 1962 he is not receiving any stipend from the Canadian Government, and it would appear that his own government has not made any request for his return. Does the appellant should feel that he has a moral obligation, that it is a civic duty for him to return? It is for him to answer that question but it is not a matter on which the Board can pronounce.

This case is unique in more than one aspect and in the light of its own circumstances the Board is of the opinion that there are reasonable grounds for the granting of special relief.

#### For all these reasons the Board ORDERS that

- the appeal be dismissed pursuant to Section 14 of the Immigration Appeal Board Act and the appeal is hereby dismissed;
- 2) the execution of the order of deportation be stayed pursuant to Section 15 of the aforesaid Act under the following conditions:
  - a) the appellant shall enrol in a regular course of medical studies at a recognized Canadian university and start his studies at the next earlier commencement;
  - b) shall complete successfully each and every academic year and report thereon to the Board;

L'appelant est venu au Canada afin de poursuivre et terminer ses études en médecine et il semble bien étrange qu'après presque douze années il n'ait pas encore réalisé son dessein. Toutefois, j'estime qu'on ne pourrait guère dire que ceci résulte d'un manque de décision ferme prise par l'appelant. Soulignons qu'après l'échec du premier semestre à la faculté de médecine, échec qui a mis fin à sa bourse, les autorités canadiennes ont donné à l'appelant l'autorisation de poursuivre ses études, à titre privé et à ses frais; de fait, en dépit des difficultés financières qu'il a rencontré, l'appelant a étudié et a obtenu quelques succès car à présent il est réadmissible au niveau pré-médical de l'université.

Lors de sa rencontre avec les autorités de l'immigration et lorsqu'il a témoigné sous serment, l'appelant a réaffirmé que son but ultime, a été et est toujours de devenir docteur en médecine pour ensuite retourner dans son pays afin d'y achever son internat. L'appelant a certainement fait preuve de mauvais jugement en présentant une demande de résidence permanente au lieu de demander, en temps approprié, un renouvellement ou une prolongation de son statut d'étudiant, mais l'article 34(1)(a) n'a pas été retenu contre lui; l'ordonnance d'expulsion mentionne qu'il a présenté une demande de résidence permanente après l'expiration du délai à l'intérieur duquel il avait l'autorisation de rester au Canada. L'appelant n'est pas à la charge du gouvernement et il est peu probable qu'il le devienne puisque depuis 1962 il ne reçoit aucun traitement du gouvernement canadien; et il semblerait que son gouvernement n'ait pas demandé son retour. L'appelant devrait-il sentir l'obligation morale, qui est un devoir civique, de retourner chez-lui? C'est à lui de répondre à cette question qui n'est pas du ressort de la Commission.

Sous plus d'un aspect cette affaire est unique et à la lumière de ces circonstances la Commission estime que des motifs raisonnables justifient l'octroi d'un redressement spécial.

# Pour tous ces motifs la Commission ORDONNE que:

- l'appel soit rejeté conformément à l'article 14 de la Loi sur la Commission d'appel de l'immigration et l'appel est rejeté par la présente;
- 2) en conformité de l'article 15 de la Loi ci-dessus citée, l'exécution de l'ordonnance d'expulsion soit suspendue, sous les conditions suivantes:
  - a) l'appelant doit s'inscrire à un cours régulier d'études médicales offert dans une université canadienne accréditée et commencer ses études à la prochaine "session académique";

c) at the conclusion of the regular course of medical studies, the appellant shall return to his own country.

The appellant is authorized to take employment between school terms during vacation period.

At Ottawa this 13th day of February, 1970.

Concurred in by: A.B. Weselak and J.A. Byrne.

For the appellant: nil;

For the respondent: D. Bandy, Esq.

c) au terme de son cours régulier d'études médicales, l'appelant doit retourner dans son pays.

L'appelant est autorisé a accepté un emploi durant les vancances scolaires.

Fait à Ottawa le 13 février 1970.

Ont souscrit: A.B. Weselak et J.A. Byrne.

Pour l'appelant: aucun; Pour l'intimé: M. D. Bandy.

27. Nikolaos AGOUROS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: February 13, 1970; File: 69-562.

<u>Coram</u>: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Vice-Chairman Gérard Legaré.

Section 15 - scope and powers of Board re 15(1)(b) - Immigration Appeal Board Act: 15.

Held: The appeal is dismissed on law.

The scope of subsections (b)(i) and (ii) of section 15(1) Immigration Appeal Board Act and the powers and duties of the Board in relation thereto are clearly distinguishable one from the other.

The use of the word "may" in section 15(1)(b)(i) is not permissive and does not involve the exercise of "discretion on the part of the Board. It gives the Board the jurisdiction to quash, stay etc. the order of deportation, and if proof is made for one or both of the conditions very specifically set out in the section and there is no ground to reject such proof, the Board <u>must</u> take action under the last part of section 15(1). The only discretion involved is in the degree of remedy to be granted. But the burden of proof on the person concerned in respect of this subsection is heavy.

Section  $15\,(1)\,(b)\,(ii)$  is quite different in scope and content. The words "in the opinion of" clearly invest the Board with discretion – judicial, not administrative.

The Board is a Court, not an administrative tribunal, and so, if anything, its duty to act judicially in exercising its discretion resection  $15\,(1)\,(b)\,(ii)$  is higher, i.e. based on evidence, objectively, and impartially.

The scope of section 15(1) (b) (ii) extends to persons other than the person concerned. The "special relief" is granted to him, since he is the person falling within the Board to jurisdiction, but there is nothing in the subsection - as there is in section 15(1) (b) (i) - restricting the "compassionate a humanitarian considerations" to him alone.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

This is an appeal from a deportation order made at Toronto, Ontario, on March 14, 1969, by Special Inquiry Officer Klaus Bufe, against the appellant, Nicolaos AGOUROS, in the following terms: 27. Nikolaos AGOUROS,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 13 février 1970; Dossier: 69-562.

<u>Coram</u>: Mlle J.V. Scott, président, Jean-Pierre Houle, vice-président, Gérard Legaré.

Article 15 - portée et compétence de la Commission relativement à l'article 15(1)(b) - Loi sur la Commission d'appel de l'immigration: 15.

Arrêt: L'appel est rejeté en droit.

Les paragraphes(b)(i) et (ii) de l'article 15(1) de la Loi sur la C.A.I. sont nettement différents quant à leur portée et aux pouvoirs et devoirs qu'ils reconnaissent à la Commission.

Le sens du mot "peut" dans le contexte de l'article 15(1) (b)(i) n'est pas facultatif et ne comporte pas l'exercice d'une "discrétion" de la part de la Commission. Il donne à la Commission la compétence pour annuler, surseoir, etc., à une ordonnance et si l'une ou les deux conditions décrites avec grande précision à l'article 15(1)(b)(i) sont prouvées, et s'il n'y a pas de motif pour refuser d'accueillir cette preuve, la Commission est obligée d'agir conformément à la dernière partie de l'article 15(1). Il n'est de discrétion que dans l'étendue du redressement qui sera accordé à la personne intéressée. Mais le fardeau de la preuve imposé à cette personne à l'égard de ce paragraphe est lourd.

L'article 15(1)(b)(ii) diffère sensiblement dans son contenu et dans sa portée. Les mots "de l'avis de" confèrent nettement à la Commission une discrétion, mais cette discrétion est judiciaire et non administrative.

La Commission est une Cour et non un tribunal administratif et par conséquent, elle a d'autant plus le devoir d'agir judiciairement lorsqu'elle exerce la discrétion qui lui est reconnue par l'article 15(1)(b)(ii); c'est donc dire qu'elle doit se fonder sur la preuve, objectivement et sans parti-pris.

La portée de l'article 15(1)(b)(ii) s'étend aux personnes autres que la personne intéressée. Le "redressement spécial" lui est accordé, puisque c'est lui qui tombe sous la juridiction de la

- "(1) you are not a Canadian citizen;
  - (2) you are not a person having Canadian domicile; and that:
  - (3) you are a person described in subparagraph (vii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you eluded examination under the Immigration Act;
  - (4) you are a person described in subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an immigration officer, remain in Canada after the departure of the vehicle on which you came into Canada;
  - (5) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

Mr. Agouros waived the right to counsel at the hearing of his appeal, and acted on his own behalf. The Minister was represented by Mr. D. Cohen.

The relevant facts of this case are as follows:

The appellant is a 20 year old citizen of Greece, who arrived in Canada sometime in March 1967 as a member of the crew of the S.S. Ariston. He left this vessel early in April 1967 and remained in Canada, eventually proceeding to Toronto, where he met and subsequently married a Canadian citizen of Greek origin, née Stamatia Kovios. The marriage took place on December 7, 1968. In late February 1969, Mr. Agouros, apparently at the urging of his wife, reported to the local Immigration Office, where he was arrested pursuant to section 16 of the Immigration Act. The inquiry which resulted in the deportation order above quoted was held on March 14, 1969, pursuant to section 25 of the Immigration Act.

The evidence adduced at the inquiry clearly supports the allegation that Mr. Agouros is not a Canadian citizen nor is he a person having Canadian domicile.

The evidence in support of paragraphs (4) and (5) of the order was as follows (p. 9-11, Minutes of Inquiry):

- "Q. When you left the boat was it your intention to return to the boat or stay in Canada?
- A. My intention was to stay in Canada.

Commission, mais rien dans ce paragraphe ne limite, comme au paragraphe 15(1)(b)(i), les "considérations d'ordre humanitaire et les motifs de pitié" au seul appelant.

Le jugement de la Commission fut rendu par:

M11e J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue à Toronto, Ontario, le 14 mars 1969, par l'enquêteur spécial Klaus Bufe contre l'appelant, Nikolaos AGOUROS. L'ordonnance d'expulsion est rédigée comme suit:

- "(1) you are not a Canadian citizen;
  - (2) you are not a person having Canadian domicile; and that:
  - (3) you are a person described in subparagraph (vii) of paragraph (e) of subsection (1) of dection 19 of the Immigration Act in that you eluded examination under the Immigration Act;
  - (4) you are a person described in subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an immigration officer, remain in Canada after the departure of the vehicle on which you came into Canada;
  - (5) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

M. Agouros a renoncé à son droit à un conseiller juridique à l'audition de son appel et il a plaidé sa propre cause.

M. D. Cohen occupait pour le Ministre.

Les faits pertinents sont les suivants:

L'appelant est un citoyen de la Grèce, âgé de 20 ans, qui est arrivé au Canada au cours du mois de mars 1967 comme membre d'équipage du S.S. Ariston. Il a quitté ce navire au début d'avril 1967 et il est demeuré au Canada, se rendant plus tard à Toronto où il a rencontré puis épousé une citoyenne canadienne d'origine grecque, née Stamatia Kovios. Le mariage a eu lieu le 7 décembre 1968. A la fin de février 1969, M. Agouros, apparament sur les instances de son épouse, s'est présenté au bureau de l'immigration local où il a été arrêté en vertu de l'article 16 de la Loi sur l'immigration. L'enquête qui a donné lieu à l'ordonnance d'expulsion ci-devant citée a été tenue le 14 mars 1969 en vertu de l'article 25 de la Loi sur l'immigration.

- Q. Did you receive the approval of a Canadian Immigration Officer to leave the boat and remain in Canada?
- A. No.
- Q. Did you report to a Canadian Immigration Officer?
- A. No.
- Q. Did you realize that before you can come into this country and stay you have to get the permission of an Immigration Officer?
- A. Yes I knew it.
- Q. Then why did you not report to an Immigration Officer?
- A. Because I was afraid.
- Q. Do you admit that you did not present yourself for an examination to an Immigration Officer when you left the ship S.S. Ariston?
- A. Yes I admit it.
- Q. Do you also admit that you never received the permission of an Immigration Officer after you left the ship to stay in Canada?
- A. Yes.
- Q. Where did the S.S. Ariston go from Vancouver?
- A. I don't know.
- Q. Do you know when the ship left?
- A. No I don't.
- Q. Has the ship left Canada?
- A. I don't know.
- Q. Are you saying that your ship is still in Canada?
- A. I imagine it has left but I have no way of knowing.
- Q. Where was it supposed to be going?
- A. I don't know.
- Q. You told me earlier that the ship was in Vancouver for one month?
- A. Yes.
- Q. After that one month what happened to the ship?
- A. I left the ship about twenty days after it was in Vancouver and I don't know what happened to it.
- Q. Were you on board the S.S. Ariston when it left Canada?
- A. No.

La preuve apportée à l'enquête soutient nettement l'allégation que M. Agouros n'est pas un citoyen canadien et qu'il n'est pas une personne ayant un domicile canadien.

La preuve à l'appui des alinéas (4) et (5) de l'ordonnance est la suivante (pp. 9-11 du procès-verbal de l'enquête):

- "Q. When you left the boat was it your intention to return to the boat or stay in Canada?
- A. My intention was to stay in Canada.
- Q. Did you receive the approval of a Canadian Immigration Officer to leave the boat and remain in Canada?
- A. No.
- Q. Did you report to a Canadian Immigration Officer?
- A. No.
- Q. Did you realize that before you can come into this country and stay you have to get the permission of an Immigration Officer?
- A. Yes I knew it.
- Q. Then why did you not report to an Immigration Officer?
- A. Because I was afraid.
- Q. Do you admit that you did not present yourself for an examination to an Immigration Officer when you left the ship S.S. Ariston?
- A. Yes I admit it.
- Q. Do you also admit that you never received the permission of an Immigration Officer after you left the ship to stay in Canada?
- A. Yes.
- Q. Where did the S.S. Ariston go from Vancouver?
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- A. Yes.
- Q. After that one month what happened to the ship?
- A. I left the ship about twenty days after it was in Vancouver and I don't know what happened to it.

By Special Inquiry Officer:

This inquiry is adjourned for five minutes.

By Special Inquiry Officer: to Person concerned:

This inquiry is resumed. Mr. Agouros, you are still under oath.

I am producing from our record a true and faithful copy of a record for a Seaman Deserter taken from the Official Immigration Records and certified by J.R.G. Robillard, Chief of Records and this is a photocopy of a Crew Index Card in the name of Nikolaos Agouros, signed by the master of the vessel and sworn to before an Immigration Officer at Vancouver on 7 April 1967.

- O. Would you look at this please, does this refer to you?
- A. Yes.
- Q. And in the Remarks column of this form there is a notation listing five names. Would you look at these names?
- A. Yes I recognize them, they were seamen on the boat.
- Q. Did these five people listed here leave the ship at Vancouver?
- A. Yes.
- Q. Do you have any reason to believe that the S.S. Ariston is still in Canada?
- A. I have no reason to believe that.
- Q. Have you ever received any information from anyone that the S.S. Ariston has left Canada?
- A. Yes one fellow told me that the ship left sir.
- Q. Do you admit that the S.S. Ariston has left Canada?
- A. Yes."

Following the reasoning set out in the Board's reasons for judgment in Klempetsanis v. Minister of Manpower and Immigration (unreported, June 5, 1969), the above quoted evidence must be held to support the order of deportation, and the appeal therefrom is dismissed.

The Board must now consider the application of section  $15\,(1)$  of the Immigration Appeal Board Act of which the relevant subsections are (b) (i) and (ii).

 $Q_{\, \cdot \, }$  Were you on board the S.S. Ariston when it left Canada? A. No.

By Special Inquiry Officer:

This inquiry is adjourned for five minutes.

By Special Inquiry Officer: to Person concerned:

This inquiry is resumed. Mr. Agouros, you are still under oath.

I am producing from our record a true and faithful copy of a record for a Seaman Deserter taken from the Official Immigration Records and certified by J.R.G. Robillard, Chief of Records and this is a photocopy of a Crew Index Card in the name of Nikolaos Agouros, signed by the master of the vessel and sworn to before an Immigration Officer at Vancouver on 7 April 1967.

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- Q. Do you have any reason to believe that the S.S. Ariston is still in Canada?
- A. I have no reason to believe that.
- Q. Have you ever received any information from anyone that the S.S. Ariston has left Canada?
- A. Yes one fellow told me that the ship left sir.
- Q. Do you admit that the S.S. Ariston has left Canada?
- A. Yes."

Selon le raisonnement suivi par la Commission dans les raisons de sa décision dans l'affaire Klempetsanis c. le ministre de la Main-d'oeuvre et de l'Immigration, la preuve ci-devant citée doit être reçue à l'appui de l'ordonnance et l'appel est par conséquent rejeté.

La Commission doit maintenant s'arrêter à l'application de l'article 15(1) de la Loi sur la Commission d'appel de l'immigration dont les paragraphes pertinents sont les paragraphes (b), (i) et (ii).

The scope of these subsections and the powers and duties of the Board in relation thereto are clearly distinguishable one from the other. Section 15(1)(b)(i) provides:

"in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

(i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The use of the word "may" in this context is not permissive and does not involve the exercise of "discretion" on the part of the Board.

The interpretation Act 15 Eliz. II c. 7 provides:

"S. 3(1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment. ..." (italics mine)

Section 28(22) provides that the word "may" is "to be construed as permissive".

An examination of section  $15\,(1)\,(b)\,(i)$  of the Immigration Appeal Board Act, however, leads to the conclusion that a contrary intention appears to such a construction.

In Black's Dictionary we find, in respect of the word "may":
"An auxilliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission ... Regardless of the instrument ... courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar."

In Mcdougall v. Paterson, 6 Exch. 337 n, 155 E.R. 571, the court held "when a statute confers authority to do a judicial act in a certain case it is imperative on those so authorized to exercise the authority when the case arises..."

In Re Zwicker, 1939, 1 D.L.R. 729 (N.S. S.C.) Sir Joseph Chisholm C.J., after quoting McDougall and Paterson, goes on to say (at page 734):

Ces paragraphes sont nettement différents quant à leur portée et aux pouvoirs et devoirs qu'ils reconnaissent à la Commission. L'article 15(1)(b)(i) stipule que:

"dans le case d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu

(i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

Le mot "peut" dans ce contexte n'exprime pas une faculté et ne comporte pas l'exercice d'une "discrétion" de la part de la Commission.

La Loi d'interprétation: 16 Eliz. II, ch. 7 prévoit:

"a. 3(1) A moins qu'une intention contraire n'aparaisse, chacune des dispositions de la présente loi s'étend et s'applique à tout texte législatif... (le souligné est de l'auteur).

L'article 28(22) prévoit que le mot "peut" exprime une faculté".

L'examen de l'article 15(1)(b)(i) de la Loi sur la Commission d'appel de l'immigration nous porte cependant à conclure qu'il y a une intention contraire à une telle interprétation.

Dans le dictionnaire de Black, on trouve au mot "may":
"An auxilliary verb qualifying the meaning of another verb by
expressing ability, competency, liberty, permission ... Regardless
of the instrument ... courts not infrequently construe "may" as
"shall" or "must" to the end that justice may not be the salve of
grammar."

Dans l'affaire Mcdougall c. Paterson, 6 Exch. 337 n, 155 E.R. 571, la Cour a décidé que "when a statute confers authority to do a judicial act in a certain case it is imperative on those so authorized to exercise the authority when the case arises..."

Dans l'affaire Zwicker, 1939, 1 D.L.R. 729 (N.S. S.C.) le juge sir Joseph Chisholm après avoir cité McDougall et Paterson, poursuit ainsi (page 734):

"In Julius v. Lord Bishop of Oxford (1880), 5 App. Cas. 214 at p. 225, Lord Cairms stated that 'Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

In the earlier case of Rex & Reg. v. Barlow, 2 Salk. 609, 91 E.R. 516, it was decided that when a statute authorizes the doing of a thing for the sake of justice or the public good the word may means shall. With respect to words which, in their ordinary meaning, are permissible or enabling, such as  $\underline{\text{may}}$  or  $\underline{\text{it shall be lawful}}$ , there are circumstances which  $\underline{\text{may}}$  make them obligatory. As the Lord Chancellor says in the case of Julius v. Lord Bishop of Oxford (5 App. Cas. at pp. 222-3):

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

In Justin and Town of Brampton (1929) 36 O.W.N. 114 the interpretation of a section of the Assessment Act (Ont.) was in question. This section read:

"The Court of Revision shall, at any time during the year for which an assessment has been adopted by the council or before the 1st day of July in the following year, and upon at least 5 days' notice in writing, receive and decide upon an application from any person assessed for a tenement which has remained vacant during more than 3 months in the year for which an assessment has been so adopted ... and the Court of Revision may (subject to the provisions of any by-law in this behalf) remit or reduce the taxes of any such person or reject the petition; and the council may from time to time make such by-laws and repeal or amend the same."

There the Court held that the word "may" did not confer merely a discretionary or enabling power, but imposed an obligation to decide according to the principle of the section and to grant relief unless grounds are shown for rejection.

"In Julius v. Lord Bishop of Oxford (1880), 5 App. Cas. 214 at p. 225, Lord Cairns stated that 'Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

In the earlier case of Rex & Reg. v. Barlow, 2 Salk, 609, 91 E.R. 516, it was decided that when a statute authorizes the doing of a thing for the sake of justice or the public good the word may means shall. With respect to words which, in their ordinary meaning, are permissible or enabling, such as may or it shall be lawful, there are circumstances which may make them obligatory. As the Lord Chancellor says in the case of Julius v. Bishop of Oxford (5 App. Cas. at pp. 222-3):

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

Dans l'affaire Justin and Town of Brampton (1929) 36 O.W.N. 114, l'inteprétation d'un article de l'Assessment Act (Ont.) était en litige. Cet article est le suivant:

"The Court of Revision shall, at any time during the year for which an assessment has been adopted by the council or before the 1st day of July in the following year, and upon at least 5 days' notice in writing, receive and decide upon an application form any person assessed for a tenement which has remained vacant during more than 3 months in the year for which an assessment has been so adopted ... and the Court of Revision may (subject to the provisions of any by-law in this behalf) remit or reduce the taxes of any such person or reject the petition; and the council may from time to time make such by laws and repeal or amend the same."

Dans ce cas la Cour a décidé que le mot 'may' à l'article 15(1) semblerait être la bonne: il donne à la Commission la compétence pour annuler, surseoir, etc., à une ordonnance et si l'une ou les deux conditions décrites avec grande précision à l'article 15(1)(b)(i) sont

This would appear to be the correct interpretation of the word "may" in section 15(1): it gives the Board the jurisdiction to quash, stay etc. the order of deportation, and if proof is made for one or both of the conditions very specifically set out in section 15(1)(b)(i), and there is no ground to reject such proof, the Board must take action under the last part of section 15(1); it has a duty and obligation to do so. There is no question of discretion whatsoever, except in the degree of remedy to be granted to the person concerned.

It may be noted that the burden of proof on the person concerned in respect of this subsection, is heavy, by virtue of the precise wording used.

Furthermore, section  $15\left(1\right)\left(b\right)\left(i\right)$  applies only to the person concerned.

Section 15(1)(b)(ii) is quite different in scope and content:

"in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

(ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash to order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The words "in the opinion of" clearly invest the Board with discretion but such discretion is judicial, not administrative, and it must be judicially exercised. A clear statement of such discretionary power is to be found in Min. of National Revenue v. Wrights' Canadian Ropes Ltd (1947) A.C. 109 where Lord Greene, delivering the judgment of the Judicial Committee of the Privy Council said (at page 123):

"But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in Sharp v. Wakefield, he must act 'according to the rules of reason and justice, not according to private opinion ... according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular ...'. ... 'As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision."

prouvées, et s'il n'y a pas de motif pour refuser d'accueillir cette preuve, la Commission est <u>obligée</u> d'agir conformément à la dernière partie de l'article 15(1); elle a le devoir et l'obligation de le faire. Il n'est absolument pas question de discrétion, excepté quant à l'étendue du redressement qui sera accordé à la personne intéressée.

Notons que le fardeau de la preuve imposé à la personne intéressée à l'égard de ce paragraphe est lourd et ce en vertu de la précision du libellé.

De plus, l'article 15(1)(b)(i) ne s'applique qu'à la personne intéressée.

L'article 15(1)(b)(ii) diffère dans son contenu et dans sa portée:

"dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu

(ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

Les mots "de l'avis de" confèrent nettement à la Commission une discrétion mais cette discrétion est judiciaire, non pas administrative, et elle doit être exercée judiciairement. L'assertion nette de ce pouvoir discrétionnaire se trouve dans l'affaire Min. of National Revenue c. Wrights' Canadian Ropes Ltd. (1945) A.C. 109, lorsque Lord Green déclare dans le jugement du Comité judiciaire du Conseil privé (page 123):

"But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in <a href="Sharp v. Wakefiled">Sharp v. Wakefiled</a>, hu must act 'according to the rules of reason and justice, not according to private opinion ... according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular...'. ... 'As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision."

In Re Rose  $\S$  Bd of Commissioners of Police for the city of Toronto (1953) O.R. 556, Lebel J., applying Wrights's case, held that the Board (of Police Commissioners) "does not function solely as an administrative body, with absolute discretion, since its decisions are made subject to an appeal to a Court of law, and the mere fact that the Board is required to exercise a discretion does not make its decision final or conclusive if it is contrary to law."

The Immigration Appeal Board is a Court, not an administrative tribunal, and therefore, if anything, its duty to act judicially in exercising its discretion pursuant to section 15(1)(b)(ii) is higher. It is at least arguable that a decision founded on the wrongful exercise of its discretion could be appealed to the Supreme Court of Canada pursuant to section 23(1) of the Immigration Appeal Board Act:

"An Appeal lies to the Supreme Court of Canada on any question of law ... from a decision of the Board on an appeal ...". The Board's exercise of any of its powers under section 15(1) are not severable from its "decision on an appeal" since these powers cannot be otherwise exercised and arise solely out of the Board's appellate jurisdiction. Further, section 15 is to be found in the Act under the heading "Appeals from Orders of Deportation" (Maxwell of Interpretation of Statutes, Ed. 12, p. 11:

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute, but they may explain ambiguous words, ...")

It is, however, unnecessary to decide this intriguing point at this time, since the considerable jurisprudence respecting the exercise of judicial discretion, and the wording of section 15(1) (b) (ii) itself, leave no doubt as to the duty of the Board to exercise its discretion in a judicial fashion, i.e. based on evidence, objectively and impartially.

It may be added that the use of the words "in the opinion of" in section  $15\,(1)\,(b)\,(ii)$ , and not in section  $15\,(1)\,(b)\,(i)$  lends added force to the interpretation of the word "may" above adopted.

The scope of section 15(1)(b)(ii) extends to persons other than the person concerned. The "special relief" is granted to him, since he is the person falling within the Board's jurisdiction, but there is nothing in the subsection - as there is in section 15(1)(b)(i) - restricting the "compassionate or humanitarian considerations" to him alone. While these doubtless cannot be said to extend to the world at large, the wording of the subsection clearly covers the situation of persons in close relationship with the person concerned, whose own future is closely allied with his and whose fate will be directly affected by the decision taken in respect of him.

Dans l'affaire Ross & Bd of Commissioners of Police for the city of Toronto (1953) O.R. 56, le juge Lebel, s'appuyant sur l'affaire Wright, déclarait que la Commission (de police) "does not function solely as an administrative body, with absolute discretion, since its decisions are made subject to an appeal to a Court of law, and the mere fact that the Board is required to exercise a discretion does not make its decision final or conclusive it it is contrary to law."

La Commission d'appel de l'immigration est une cour et non un tribunal administratif et par conséquent elle a d'autant plus le devoir d'agir judiciairement lorsqu'elle exerce la discrétion qui lui est reconnue par l'article 15(1)(b)(ii). Il est pour le moins discutable qu'une décision fondée sur un mauvais exercice de sa discrétion puisse faire l'objet d'un appel devant la Cour Suprême du Canada en vertu de l'article 23(1) de la Loi sur la Commission d'appel de l'immigration:

"Sur une question de droit ... il peut être porté à la Cour suprême du Canada un appel d'une décision de la Commission visant un appel ..."

L'exercise des pouvoirs attribués à la Commission par l'article 15(1) ne peut être séparable de sa "décision visant un appel" puisque ces pouvoirs ne peuvent être autrement exercés et qu'ils découlent uniquement de la juridiction de la Commission en appel. De plus, l'article 15 se trouve dans la Loi sous le titre: "Appels des ordonnances d'expulsion" (Maxwell on Interpretation of Statutes, Ed. 12, p. 11:

'The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute, but they may explain ambiguous words, ..."

Il n'est cependant pas nécessaire d'éclaircir cette question intéressante dans ce cas, puisqu'une jurisprudence considérable en ce qui concerne l'exercice de la discrétion judiciaire et le libellé même de l'article 15(1)(b)(ii) ne laissent pas de doute quant au devoir qu'a la Commission d'exercer sa discrétion judiciairement, c'est-à-dire en se fondant sur la preuve, objectivement et sans partipris.

Ajoutons que l'usage des mots "de l'avis de" à l'article  $15\,(1)$  (b)(ii) et non à l'article  $15\,(1)$  (b)(i) ne fait qu'appuyer l'interprétation déjà donnée au mot "peut" ("may").

La portée de l'article 15(1)(b)(ii) s'étend aux personnes autres que la personne intéressée. Le "redressement spécial" lui est accordé, puisque c'est lui qui tombe sous la juridiction de la Commission, mais rien dans ce paragraphe ne limite, comme au paragraphe 15(1)(b)(i), les "considérations d'ordre humanitaire et les motifs de pitié" au seul appelant. Quoique ces considérations ne puissent certes pas s'appliquer à n'importe qui, le libellé du paragraphe

In the instant appeal, no evidence was adduced at the hearing of the appeal to support the application of section  $15\,(1)\,(b)\,(i)$ , nor was there any evidence as to the existence of compassionate or humanitairian considerations in respect of the appellant himself. The appellant was not an impressive witness, and indeed some of his testimony at the hearing of his appeal was such as to cast grave doubts on his credibility.

The only evidence given by the appellant which has any relevance to section  $15\,(1)\,(b)\,(ii)$  is as follows:

Questioned by the Special Inquiry Officer:

"Q. Why did you leave the boat?

A. I have a father who is physically impaired and a brother who is also physically impaired and my father is paralyzed from the waist down and I wanted to help my family as much as I could and I wanted to make money". (page 9, Minutes of Inquiry).

Mr. Agouros testified at the hearing of his appeal that he had sent money to his family until his marriage on December 7, 1968, at which time he contracted debts in Canada which he is still paying off.

At the hearing of his appeal, questioned by the Chairman, the appellant testified (page 7, transcript of hearing):

- "Q. Do you kno whether you have been called up for military service in Greece?
- A. Yes.
- Q. You have actually been called up?
- A. Oh yes.
- O. How long ago was that?
- A. One week ago.
- Q. When do you have to report?
- A. I should report on the 27th of February."

The Board has frequently held that the mere fact that the person concerned may be economically better off in Canada is not sufficient, in itself, to warrant the granting of special relief pursuant to section  $15(1)\,(b)\,(ii)$ .

An obligation on the part of the person concerned to undertake military service on behalf of the country of which he is a citizen is not a ground, so far as the appellant is concerned, for the exercise of the Board's equitable jurisdiction under either section 15(1)(b)(i) or (ii). In Caudill v. Minister of Manpower and Immigration (1969) 1 I.A.C. 108, the Board held (per J.C.A. Campbell, Vice-Chairman), at page 115:

permet clairement d'englober les personnes qui ont des liens étroits avec la personne intéresée, ceux dont l'avenir dépend intimement du sien et dont le sort sera directement touché par la décision prise à son sujet.

Dans l'instance, aucune preuve n'a été administrée à l'audition de l'appel pour appuyer l'application de l'article 15(1)(b)(ii) et aucune preuve n'a été apportée quant à l'existence de motifs de pitié ou de considérations d'ordre humanitaire à l'égard de l'appelant luimême. Le témoignage de l'appelant n'a pas impressionné et en fait une partie de son témoignage à l'audition de l'appel pouvait nous porter à douter sérieusement de sa crédibilité.

La seule preuve pertinente à l'article 15(1)(b)(ii) donnée par l'appelant est la suivante:

Interrogé par l'enquêteur spécial:

- ''Q. Why did you leave the boat?
- A. I have a father who is physically impaired and a brother who is also physically impaired and my father is paralyzed from the waist down and I wanted to help my family as much as I could and I wanted to make money". (page 9 au procès-verbal de l'enquête)
- M. Agouros a déclaré à l'audition de son appel qu'il avait envoyé de l'argent à sa famille jusqu'au moment de son mariage, le 7 décembre 1968, alors qu'il a fait des dettes au Canada, dettes qu'il n'a pas fini de rembourser.

Interrogé par le président à l'audition de l'appel, l'appelant a déclaré ceci (page 7, procès-verbal de l'audition):

- "Q. Do you know whether you have been called up for military service in Greece?
- A. Yes.
- Q. You have actually been called up?
- A. Oh yes.
- Q. How long ago was that?
- A. One week ago.
- Q. When do you have to report?
- A. I should report on the 27th of February."

La Commission a maintes fois décidé dans le passé que le seul fait que la personne intéressée puisse être plus à l'aise financièrement au Canada ne suffit pas à justifier l'octroi d'un redressement spécial en vertu de l'article 15(1)(b)(ii).

"(Caudill) may well be liable to punishment for being an absentee without leave from the United States Marine Corps. Such punishment is certainly not the result of political activities nor can it be construed as being "unusual hardship".

The fact that his opinions regarding the involvement of his country in the war in Viet Nam differ from those in authority in his home country do not in the opinion of the Board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief."

In the instant appeal, therefore, in so far as Mr. Agouros himself is concerned, there is no evidence which would support the invocation of section 15(1)(b)(ii) on his behalf. However, in the opinion of the Board, the situation of Mrs. Agouros warrants the granting of special relief to the appellant pursuant to the subsection. Mrs. Agouros is eighteen years of age, and has lived in Canada for fourteen years. She is a Canadian citizen and except for grandparents, her whole family resides in Canada. She can speak the Greek language, but has spent all her formative years in Canada. She testified before the Board (questioned by the Chairman), (page 8, transcript of hearing):

- "Q. When did you find out that he (the appellant) had no legal status in this country?
- A. ... 6 months before we got married he told me when I first met him that he was here illegally. He did tell me before.
- Q. I see, and did you know what would happen to him? A. Yes.
- Q. But you married him anyway?
- A. Yes
- Q. If he had to go back to Greece would you go back with him?
- A. I really don't know what I would do. It is so hard -because I because I am pregnant and my baby is due in August. If I go back there -- really -- I don't know what I will do and I won't even be with him because he will be drafted into the Greek navy. So there is not really much that I can do. I would have to stay here and have my baby, and I don't know how I would support myself -- I don't know what I would do -- I don't know how I would support myself -- pay for the baby -- pay the bank loan and pay the rent I don't know really what I would do -- how I would support myself.

L'obligation pour la personne intéressée de faire son service militaire dans le pays dont il est le citoyen n'est pas un motif, en ce qui concerne l'appelant, qui justifie l'exercice de la juridiction en équité attribuée à la Commission soit par l'article 15(1)(b)(i) ou (ii). Dans l'affaire Caudill c. Ministre de la Main-d'oeuvre et de l'Immigration (1969), l A.I.A. 108, la Commission a déclaré (par le vice-président J.C.A. Campbell) à la page 115:

"Caudill) may well be liable to punishment for being an absentee without leave from the United States Marine Corps. Such punishment is certainly not the result of political activities nor can it be constured as being "unusual hardship". The fact that his opinions regarding the involvement of his country in the war in Viet Nam differ from those in authority in his home country do not in the opinion of the Board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief."

Par conséquent, dans l'instance, aucune preuve n'appui, dans la mesure où il s'agit de M. Agouros lui-même, le recours à l'article 15(1)(b)(ii) en sa faveur. Cependant, la Commission estime que la situation de Mme Agouros justifie l'octroi d'un redressement spécial à l'appellant en vertu de ce paragraphe. Mme Agouros est âgée de dix-huit ans et demeure au Canada depuis quatorze ans. Elle est citoyenne canadienne et, à part ses grand-parents, toute sa famille demeure au Canada. Elle parle Grec, mais elle a reçu toute son éducation au Canada. Elle a témoigné ainsi devant la Commission (interrogée par le président), (page 8 du procès-verbal de l'audition):

"Q. When did you find out that he (the appellant) had no legal status in this country?

A. ... 6 months before we got married he told me when I first met him that he was here illegally. He did tell me before.

- Q. I see, and did you know what would happen to him?
- A. Yes.

Q. If he had to go back to Greece would you go back with him?

A. I really don't know what I would do. It is so hard because I - because I am pregnant and my baby is due in
August. If I go back there -- really -- I don't know what
I will do and I won't even be with him because he will be
drafted into the Greek navy. So there is not really much
that I can do. I would have to stay here and have my
baby, and I don't know how I would support myself -- I don't
know what I would do -- I don't know how I would support
myself -- pay for the baby-- pay the bank loan and pay the
rent I don't know really what I would do -- how I would
support myself.

- Q. Is your family in a position to help you in such a situation?
- A. I don't think well, they could give me a little bit of help, but I don't think they could do much because they have five more kids to support.
- Q. Are you the oldest?
- A. No. I am the sixth.
- Q. You're the youngest?
- A. No. There are nine children in my family.
- Q. But there is still some at home?
- A. Yes."

In support of her statement that she was expecting a child, Mrs. Agouros filed a medical certificate, dated February 10, 1970, under signature of Lionel I. Tanzer, M.D., F.R.C.S. (C) (Exhibit A-1 at the hearing of the appeal). It will be noted that the marriage of the appelant took place some three months before the special inquiry, and the appellant testified that he had known the lady who subsequently became his wife some seven or eight months before marriage. There was no evidence that this marriage was entered into in an endeavour to circumvent the law.

Although Mrs. Agouros knew before marriage that her husband had no legal status in Canada it is to be doubted whether at the age of seventeen she fully grasped the implications of this fact. To deport the appellant now would involve the lengthy separation of this young couple, and would deprive his wife of the emotional and economic support of her husband at a crucial period, i.e. during the birth and infancy of their child. The Board, therefore, finds that the existence of compassionate and humanitarian grounds, vis-à-vis Mrs. Agouros, have been sufficiently proved, and it orders that the order of deporattion made against the appellant on March 14, 1969, be quashed, and directs the grant of landing to the appellant.

Dated at Ottawa this 24th day of February 1970.

Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the appellant: nil:

For the respondent: D. Cohen, Esq.

- Q. Is your family in a position to held you in such a situation?
- A. I don't think well, they could give me a little bit of help, but I don't think they could do much because they have five more kids to support.
- Q. Are you the oldest?
- A. No. I am the sixth.
- Q. You're the youngest?
- A. No. There are nine children in my family.
- O. But there is still some at home?
- A. Yes."

À l'appui de la déclaration selon laquelle elle attendait un enfant, Mme Agouros a déposé un certificat médical, en date du 10 février 1970 et signé par Lionel I. Tanzer, M.D., F.R.C.S. (c) (Pièce A-1 à l'audition de l'appel). Il est à noter que le mariage de l'appelant a eu lieu quelque trois mois avant l'enquête spéciale et que l'appelant, selon son propre témoignage, avait connu sa future épouse environ sept ou huit mois avant son mariage. Rien ne prouve que ce mariage constitue une tentative pour contourner la loi.

Même si Mme Agouros savait avant de se marier que son mari n'avait pas de statut légal au Canada, il est douteux qu'à l'âge de dix-sept ans elle ait pu saisir toutes les conséquences de ce fait. L'expulsion de l'appelant à ce moment-ci entraînerait une longue séparation de ce jeune couple et priverait sa femme du soutien économique et moral au cours de cette période critique, soit la naissance et l'enfance de leur enfant. La Commission conclut donc que l'existence de motifs de pitié et de considérations d'ordre humanitaire à l'égard de Mme Agouros a été suffisament prouvée et elle ordonne que l'ordonnance d'expulsion rendue contre l'appelant le 14 mars 1969 soit annulée et elle accorde à l'appelant le droit d'être reçu.

Fait à Ottawa le 24 février 1970.

Ont souscrit: Jean-Pierre Houle, et Gérard Legaré.

Pour l'appelant: aucun,

Pour l'intimé: M. D. Cohen.

28. Georgios ZISIMOPOULOS,

applicant,

V.

Harry Fox, as Special Inquiry Officer,

respondent.

Date of the decision: March 2, 1970; File: 69-2171.

<u>Coram:</u> Miss J.V. Scott, Chairman, Jean-Pierre Houle, Vice-Chairman, Gérard Legaré.

Jurisdiction - Whether Board has supervisory powers over S.I.O. - Immigration Appeal board Act: 11, 12, 14, 22.

Held: The Board's jurisdiction is, as regards a special inquiry, purely appellate. The relevant sections of its act are 11, 12, 14 and 22. Its jurisdiction presupposes that an order of deportation exists. It is not seized of the matter until an appeal therefrom is filed.

A person considering himself aggrieved by a failure to hold a full and proper inquiry, or by some other impropriety during the course of an inquiry, has his remedy: he has an absolute right of appeal and can raise all such arguments at the hearing of his appeal. Motion dismissed.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

 $\,$  Motion dated November 8, 1969, requesting the Immigration Appeal Board to order:

- the adjournment of the special inquiry to be held in respect of the applicant;
- 2) the replacement of the Special Inquiry Officer, Harry Fox, by another inquiry officer.

The motion came on for hearing on December 16, 1969, the applicant being represented by E.M. Berger Q.C., and the respondent by A. Nadon.

At the commencement of his argument Mr. Berger informed the Board that arrangements had already been made to replace Mr. Fox by another officer, so that this part of the motion "did not have to be dealt with", but he requested the Board to rule on the question of an application for an adjournment. Although it was not so framed, the motion was in effect an application for a writ of prohibition, and also of mandamus: Mr. Berger was asking the Board to exercise supervisory

28. Georgios ZISIMOPOULOS,

requérant,

c.

Harry Fox, ès qualité enquêteur spécial

intimé.

Date de la décision: le 2 mars, 1970; Dossier: 69-2171.

<u>Coram</u>: M1le J.V. Scott, président, Jean-Pierre Houle, vice-président, Gérard Legaré.

Jurisdiction - Question de savoir si la Commission a un pouvoir de surveillance de l'enquêteur spécial - Loi sur la Commission d'appel de l'immigration: 11, 12, 14, 22.

<u>Arrêt</u>: En ce qui concerne une enquête spéciale, la Commission n'a de juridiction qu'en appel. Les articles pertinents sont les articles 11, 12, 14 et 22. Sa juridiction présuppose l'existence de l'ordonnance d'expulsion. Elle n'est pas saisie de l'affaire avant que l'appel soit interjeté.

Une personne qui ne considère lésée par le défaut d'une enquête complète et régulière ou par quelqu'autre irrégularité au cours de l'enquête a son recours: le droit absolu de porter l'affaire en appel et de soulever tous ces arguments à l'audition. La requête est rejetée.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

Requête en date du 8 novembre, 1969, demandant à la Commission d'appel de l'immigration d'ordonner que:

- 1) l'enquête spéciale projetée à l'égard du requérant soit ajournée;
- le remplacement de l'enquêteur spécial Harry Fox par un autre enquêteur spécial.

La requête fut entendue le 16 décembre 1969; Me E.M. Berger, c.r. représentait le requérant et Me Alain Nadon occupait pour l'intimé.

Au début de son plaidoyer Me Berger déclara à la Commission que le remplacement de M. Fox par un autre enquêteur avait déjà été préparé et qu'ainsi cette partie de la requête "did not have to be dealt with", mais il a demandé à la Commission de décider de la question jurisdiction over the lower tribunal before there was any decision by that tribunal (and in this case, before there was any hearing on the merits) and before any appeal to the Board was launched.

Leaving aside the fact that Mr. Berger, under the circumstances, appeared to be asking for a declaratory judgment, this motion can be simply disposed of, since the Board has no jurisdiction to entertain it.

The Board's jurisdiction is, as regards a special inquiry, purely appellate. The relevant sections of the Immigration Appeal Board Act are sections 11, 12, 14 and 22. It is true that section 22 provides in part that the Board "has sole and exclusive jurisdiction to hear and determine all questions of fact or law ... that may arise in relation to the making of an order of deportation ...", but this presupposes that an order of deportation exists, and further, the Board is not seized of the matter until an appeal therefrom is filed.

The supervisory jurisdiction of a Court of Appeal over a lower tribunal, if such an expression can be used at all, is that resulting from a judgment on appeal. A person considering himself aggrieved by a failure to hold a full and proper inquiry, or by some other impropriety during the course of an inquiry, has his remedy: he has an absolute right of appeal pursuant to section 11 of the Immigration Appeal Board Act, and he can raise all such arguments at the hearing of his appeal.

The motion is therefore dismissed for want of jurisdiction.

Dated at Ottawa, this 25th day of February 1970.

Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the applicant: Me.M. Berger, advocate; For the respondent: Me A. Nadon, advocate.

d'une demande d'ajournement. Même si elle n'est pas ainsi présentée, la requête vise en fait un bref de prohibition et de mandamus.

M. Berger demandait à la Commission d'exercer sa juridiction de surveillance d'un tribunal inférieur avant que ce tribunal n'ait pris sa décision (et dans ce cas, avant même qu'il n'ait entendu le fond de l'affaire) et avant qu'un appel soit interjeté.

Si on passe outre au fait que M. Berger dans les circonstances semble demander un jugement déclaratoire, cette requête peut être sommairement expédiée puisque la Commission n'est pas compétente à la recevoir.

La compétence de la Commission à l'égard d'une enquête spéciale est limitée à l'appel. Les articles pertinents de la Loi sur la Commission d'appel de l'immigration sont les articles 11, 12, 14 et 22. Il est vrai que l'article 22 prévoit en partie que la Commission a "compétence exclusive pour entendre et décider toute question de fait ou de droit... qui peuvent se poser a l'occasion de l'établissement d'une ordonnance d'expulsion ...", mais cela présuppose l'existence d'une ordonnance d'expulsion et, de plus, la Commission n'est pas saisie de l'affaire avant que l'appel de cette ordonnance soit déposée.

La compétence de surveillance d'une Cour d'appel à l'égard d'un tribunal inférieur, si une telle expression est permise, résulte toujours d'un jugement en appel. Une personne qui se considère lésée par le défaut d'une enquête complète et régulière ou par quelqu'autre irrégularité au cours de l'enquête, a son recours: il a un droit absolu en vertu de l'article 11 de la Loi sur la Commission d'appel de l'immigration, de loger un appel et de soulever tous ces arguments à l'audition de son appel.

La requête est donc rejetée pour défaut de compétence.

Fait à Ottawa le 25 février 1970.

Ont souscrit: Jean-Pierre Houle, et Gérard Legaré.

Pour le requérant: Me E.M. Berger; pour l'intimé: Me A. Nadon. 29.
Jeong Chang KIM,

appellant.

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 3, 1970; File: 69-470.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, Lucien Cardin.

Inquiry - meaning of "forthwith" in Section 25 Immigration Act. - Immigration Act: 7(3), 16, 25, 33, 42(3).

Held: The Immigration Act does not interpret the word "forthwith". The term can be defined in various ways and one must look to statutes precedents, definitions and the context in which the word is used to give it a reasonable interpretation.

The term "forthwith" as used in Section 42(3) of the Immigration Act prior to its amendment is sued in the same sense in Section 25 of the said Act as now constituted. Appeal dismissed.

The judgment of the Board was delivered by:

#### A.B. Weselak:

This is an appeal from a Deportation Order dated March 14, 1969, made by Special Inquiry Officer C.H. McLean at the Immigration Office, Toronto, Ontario, in respect of the appellant, Jeong Chang KIM, in the following terms:

- "(1) you are not a Canadian citizen:
  - (2) you are not a person having Canadian domicile, and that:
  - (3) you are a person described in subparagraph (vii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act as you eluded examination under the Immigration Act:
  - (4) you are a person described in subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act as you came to Canada as a member of a crew and without the approval of an Immigration officer, remain in Canada after the departure of the vehicle on which you came into Canada:
- (5) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

29. Jeong Chang KIM,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 3 mars 1970; Dossier: 69-470.

Coram: Mlle J.V. Scott, président, A.B. Weselak, Lucien Cardin.

Enquête - sens du mot "immédiatement" dans l'article 25 de la Loi sur l'immigration - Loi sur l'immigration 7(3),16, 25, 33 et 42(3).

<u>Arrêt</u>: La Loi sur l'immigration n'interprète pas le mot "immédiatement". Les définitions de ce mot sont nombreuses et on doit étudier les statuts, les précédents, les définitions et le contexte dans lesquels le mot est employé afin d'en obtenir une interprétation raisonnable.

Le mot immédiatement "forthwith" employé à l'article 42(3) de la Loi sur l'immigration avant son amendement est employé dans la même acception à l'article 25 de cette loi dans sa présente forme.

Le jugement de la Commission fut rendu par:

#### A.B. Weselak:

Appel d'une ordonnance d'expulsion rendue le 14 mars 1969 à Toronto par l'enquêteur spécial C.H. McLean contre Jeong Chang KIM, l'appelant.

L'ordonnance dit:

- "(1) you are not a Canadian citizen:
  - (2) you are not a person having Canadian domicile, and that:
  - (3) you are a person described in subparagraph (vii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act as you eluded examination under the Immigration Act:
  - (4) you are a person described in subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act as you came to Canada as a member of a crew and without the approval of an Immigration officer, remain in Canada after the departure of the vehicle on which you came into Canada:

The appellant appeared before the Court at the hearing accompanied by his counsel Mr. Fred Kan, Barrister and Solicitor. The respondent was represented by Mr. W. Bernhardt.

The appellant is a resident of and and was born on May 29, 1940 in Korea. His parents, seven brothers and one sister are in Korea and he has no relatives in Canada. He arrived in Canada on the 25th October 1967, as a member of a crew of a ship which he left without permission. He did not report immediately to an Immigration officer but proceeded to Toronto where he obtained employment. On February 17th, 1969 he reported voluntarily to an Immigration officer in Toronto. He was taken into custody, detained and then released on a cash bond for an Inquiry pursuant to Section 16 of the Immigration Act. On February 19th a letter was sent to him advising him of date of Inquiry, but this letter was returned marked "unknown". However he appeared at the Inquiry which was held on the 14th day of March 1969. The Inquiry was concluded the same day and a deportation order was issued.

Counsel for the appellant attacked the validity of the order on the ground that the Inquiry was not held "forthwith" after the arrest and detention of the appellant pursuant to Section 16 of the Immigration Act and as provided in Section 25 which provides

"25. Where a person is, pursuant to section 15 or 16, arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

and that the Special Inquiry Officer in not holding the Inquiry "forthwith" had lost jurisdiction to hold the Inquiry and the ensuing order was therefore null and void. He also questioned the departure of the vessel.

The word forthwith in the Immigration Act as now amended also appears in Section 7(3) of the Act which provides:  $\dot{} \\$ 

"7(3) Where any person who entered Canada as a non-immigrant ceases to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant and, in either case, remains in Canada, he shall forthwith report such facts to the nearest immigration officer and present himself for examination at such place and time as he may be directed and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada."

Section 42(3) of the Immigration Act prior to its amendment in its present form provided:

(5) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

L'appelant a comparu devant la Cour à l'audition; il était accompagné de son conseiller M. Fred Kan, avocat. M. Bernhardt occupait pour l'intimé.

L'appelant résident de Corée est né le 29 mai 1940 en ce pays. Ses parents, ses sept frères et sa soeur sont en Corée et il n'a pas de parenté au Canada. Le 25 octobre 1967 il est arrivé au Canada en tant que membre d'équipage d'un navire dont il a quitté le bord sans permission. Il ne s'est pas présenté directement à un fonctionnaire à l'immigration mais est allé à Toronto où il a obtenu un emploi. Le 17 février il s'est présenté volontairement à un fonctionnaire à l'immigration. Il a été placé sous garde, détenu et ensuite libéré sur dépôt d'une caution en argent, afin de procéder à une enquête conformément à l'article 16 de la Loi sur l'immigration. Le 19 février une lettre lui a été envoyé l'avertissant de la date de l'enquête mais cette lettre a été retourmée avec la mention "inconnu à l'adresse indiquée". Toutefois il apparaît que l'enquête a été tenue le 14 mars 1969. Aux termes de l'enquête, le même jour, l'ordonnance d'expulsion était émise.

Le conseiller de l'appelant a contesté la validité de l'ordonnance d'expulsion sur ce point: la tenue de l'enqu€te n'a pas eu lieu immédiatement après l'arrestation et la détention de l'appelant conformément à l'article 16 de la Loi sur l'immigration et comme le stipule l'article 25 qui dit:

"25. Lorsqu'une personne est arrêtée, avec ou sans mandat, selon l'article 15 ou 16, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne."

et que l'enquêteur spécial en ne tenant pas l'enquête "immédiatement" a perdu la compétence de tenir une enquête et l'ordonnance résultante est par conséquent nulle et non-avenue. Il a aussi mis en doute le départ du navire.

Le mot immédiatement employé dans la Loi sur l'immigration apparaît aussi dans l'article 7(3) de la Loi. L'article stipule:

"7(3) Lorsqu'une personne qui est entrée au Canada en qualité de non-immigrant cesse d'être un non-immigrant ou d'appartenir à la catégorie particulière dans laquelle elle a été admise à ce titre et dans l'un ou l'autre cas demeure au Canada, elle doit immédiatement signaler ces faits au fonctionnaire à l'immigration le plus rapproché et se présenter pour examen au lieu et au

"42(3) If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister."

Section 33 of the Immigration Act as now amended provides:

- "33(1) Unless otherwise provided in this Act, a deportation order shall be executed as soon as practicable.
  - (2) No deportation order becomes invalid on the ground of any lapse of time between its making and execution."

It is noted that the words "as soon as practicable" have been substituted for the word "forthwith".

In Black's Law Dictionary 4th Edition it is defined inter alia as

"Immediately, without delay, promptly and with reasonable despatch, the first opportunity offered".

In Volume 37 of Corpus Juris Secundum at Pages 128 to 130 the term "forthwith" is discussed as follows:

"Forthwith. The term has been said to be an elastic one, with a relative meaning depending in any case on the circumstances. Although sometimes the term has received a strict construction as a mandatory term, denoting expedition, ordinarily it is not to be strictly construed, but should receive a liberal or reasonable construction, regard being had to the nature of the act or thing to be performed and the circumstances of the case. While, as far as time is concerned, there is no precise definition of the term, for its import varies with the particular case, and will imply a longer or shorter period, according to the nature of the thing to be done, yet it does connote a present or immediately future act, rather than one long in the past.

In its ordinary or popular signification, it means as soon as may be; at once; directly; immediately; instanter; and simultaneously.

temps qui lui sont indiqués, et elle est réputée, pour les objets de l'examen et à toutes autres fins de la présente loi, une personne qui cherche à être admise au Canada.

L'article 42(3) de la Loi sur l'immigration, avant son amendement actuel, stipulait:

"42(3) If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may to the Minister."

L'article 33 de la Loi sur l'immigration dans sa présente forme stipule:

"33(1) Sauf disposition contraire de la présente loi, une ordonnance d'expulsion doit être exécutée le plus tôt possible.

(2) Nulle ordonnance d'expulsion ne devient invalide du fait d'un intervalle de temps entre son établissement et son exécution."

Remarquons que les mots "le plus tôt possible" remplacent le mot "immédiatement".

Black's Law Dictionary 4th Edition définit inter alia "forthwith" ainsi:

"Immediately, without delay, promptly and with reasonable despatch, the first opportunity offered".

Corpus  $\bar{J}uris$  Secundum dans le volume 37, des pages 128 à 130, étudie le sens du mot "forthwith":

"Forthwith. The term has been said to be an elastic one, with a relative meaning depending in any case on the circumstances. Although sometimes the term has received a strict construction as a mandatory term, denoting expedition, ordinarily it is not to be strictly construed, but should receive a liberal or reasonable construction, regard being had to the nature of the act or thing to be performed and the circumstances of the case. While, as far as time is concerned, there is no precise definition of the term, for its import varies with the particular case, and will imply a longer or shorter period, according to the nature of the thing to be done, yet it does connote a present or immediately future act, rather than one long in the past.

In more technical applications, as indicating, or allowing for, a reasonable time, the word does not mean instantaneously, instanter, or instantly, but has been variously defined as meaning as quickly as practicable; as soon as it reasonably convenient or reasonably possible; as soon as the thing may be done by reasonable exertion confined to that object, or as soon as, with reasonable dispatch in the ordinary course of business, it can be done; promptly; with all convenient dispatch; with all reasonable celerity, deligence, or dispatch; with due, or due and reasonable, diligence; within or in a reasonable time, under the circumstances of the case; within such convenient time as is reasonably requisite; within such time as to permit that which is to be done to be done lawfully and orderly and effectually according to the practical and ordinary course of the thing or things to be performed or accomplished; without delay; without inexcusable, unnecessary, or unreasonable delay."

And in the same Volume, Footnote 44, Page 129:

### 'More specifically

- (1) 'In the ordinary and orderly course of business of the court'. - Commonwealth v. Thompson, 18 Pa. Co. 487, 489.
- (2) In the reasonable course of the orderly conduct of the business of an office. - Leavitt v. Mercer Co., 89 N.W. 426, 64 Neb. 31, 33."

The Immigration Act does not interpret the word "forthwith". It can be seen that the term can be defined in various ways and one must look to statutes, precedents, definitions and the context in which the word is used to give it a reasonable interpretation.

In Archibald v. Royer 1924 1 D.L.R. 897 C.A. Chisholm J. stated

"It would be a departure from the ordinary rules of construction to give a word in a subsection a meaning different from its meaning when used in other parts of the same section, particularly when it was not necessary in order to give the word a reasonable meaning."

and in Victoria v. Bishop of Vancouver Island 1921 3 W.W.R. at Page 214 Lord Atkinson stated (referred to commonly as "The Golden Rule of Interpretation of Statutes"):

In its ordinary or popular signification, it means as soon as may be; at once; directly; immediately; instanter; and simultaneously.

In more technical applications, as indicating, or allowing for, a reasonable time, the word does not mean instantaneously, instanter, or instantly, but has been variously defined as meaning as quickly as practicable; as soon as is reasonably convenient or reasonably possible; as soon as the thing may be done by reasonable exertion confined to that object, or as soon as, with reasonable dispatch in the ordinary course of business, it can be done; promptly; with all convenient dispatch; with all reasonable celerity diligence, or dispatch; with due, or due and reasonable, diligence; within or in a reasonable time, under the circumstances of the case, within such convenient time as is reasonably requisite; within such time as to permit that which is to be done to be done lawfully and orderly and effectually according to the practical and ordinary course of the thing or things to be performed or accomplished; without delay, without inexcusable, unnecessary, or unreasonable delay."

Dans le même volume le renvoi 44 de la page 129 précise:

"More specifically

(1) 'In the ordinary and orderly course of business of the court'. - Commonwealth v. Thompson, 18 Pa. Co. 487, 489.

(2) In the reasonable course of the orderly conduct of the business of an office. - Leavitt v. Mercer Co., 89 N.W. 426, 64 Neb. 31, 33."

La Loi sur l'immigration n'interprète pas le mot "immédiatement." Comme on le voit les définitions sont nombreuses et on doit étudier les statuts, les précédents, les définitions et le contexte dans lesquels le mot est utilisé afin d'en obtenir une interprétation raisonnable.

Dans l'affaire Archibald c. Royer 1924 1 D.L.R. 897 le juge Chisholm a déclaré:

"It would be a departure from the ordinary rules of construction to give a word in a subsection a meaning different from its meaning when used in other parts of the same section, particularly when it was not necessary in order to give the word a reasonable meaning."

"In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

The word "forthwith" as used in Section 42(3) supra has been considered and interpreted by the Courts in the following cases:

In re Wong Jung 1948 W.W.R. Volume 2, Page 351, where the applicant was ordered deported on July 25, 1942 and detained. On August 5, 1942 he was released with provision that he report regularly. On July 7, 1947 a warrant was issued for his arrest for purposes of deportation. An application for a writ of Habeas Corpus was made by the applicant. It was held as stated in the headnote

'With respect to the objection that under the statute the deportation must be "forthwith:" Sec. 19(2) of the Opium, etc. Act, as amended by 1946, ch. 54, sec. 6, applies only to deportation orders following the dismissal of an appeal to the minister; and there was no such appeal here. The decision on the meaning of "forthwith" in sec. 42(2) of the Immigration, although not entirely in accord, support the conclusion that it means "with reasonable promptness." Under all the circumstances here (and they are such as can be taken judicial notice of) viz., the war, and the absence for five years of steamers between Canada and China, the delay, although long, was not unreasonable."

In re Janoczka, Volume 3, 1932 W.W.R. at Page 29:

In an application for writ of Habeas Corpus by the petitioner, the fact as briefly set out at Page 32 are:

"The adjudication in petitioner's case took place on November 24, 1930. His gaol sentence expired on December 15, 1930. He was kept in custody for the immigration authorities for about six weeks thereafter. Those authorities had evidently applied to the Polish Consul General promptly for a passport and on February 3, 1931, they had been informed by the Consul General that he would have to first obtain permission from his home authorities. In the expectation of delay petitioner was released on a form of parole without bond, requiring him to report weekly to a local justice of the peace. Petitioner went to Taylorton, Saskatchewan, in a coal mining district where some friends were and where he got work. He observed the terms of the parole and ultimately asked that the parole be relaxed

et dans l'affaire Victoria c. l'archevêque de l'île de Vancouver 1921 W.W.R. à la page 214 Lord Atkinson a déclaré (citée comme "The Golden Rule of Interpretation of Statutes"):

"In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

Les Cours ont étudié et interprété le mot "immédiatement" (forthwith) utilisé à l'article 42(3) supra:

Dans la cause Wong Jung 1948 W.W.R. volume 2 page 351 le demandeur est frappé d'expulsion et détenu le 25 juillet 1942; le 5 août il est mis en liberté surveillée; le 7 juillet 1947 un mandat d'arrestation, aux fins de son expulsion, est émis. Une demande de bref d'habeas corpus est formulée par le requérant. Dans l'introduction il a été déclaré:

"With respect to the objection that under the statute the deportation must be "forthwith:" Sec. 19(2) of the Opium, etc. Act, as amended by 1946, ch. 54, sec. 6, applies only to deportation orders following the dismissal of an appeal to the minister; and there was no such appeal here. The decision on the meaning of "forthwith" in sec. 42(2) of the Immigration Act, although not entirely in accord, support the conclusion that it means "with reasonable promptness." Under all the circumstances here (and they are such as can be taken judicial notice of) viz., the war, and the absence for five years of steamers between Canada and China, the delay, although long, was not unreasonable."

Dans la cause re Janoczka, volume 3, 1932 W.W.R. page 29 les faits relatifs à une demande de bref d'habeas corpus, sont sommairement exposés à la page 32:

"The adjudication in petitioner's case took place on November 24, 1930. His gaol sentence expired on December 15, 1930. He was kept in custody for the immigration authorities for about six weeks thereafter. Those authorities had evidently applied to the Polish Consul General promptly for a passport and on February 3, 1931, they had been informed by the Consul General that he would have to first obtain permission from his home authorities. In the expectation of delay petitioner was released on a form of parole without bond, requiring him to report weekly to a local justice of the peace. Petitioner went to Taylorton, Saskatchewan, in a coal

as in so reporting he was losing time from work. Nothing more seems to have been done about the passport until October 6, 1931, when an officer worte the Consul General on the subject and soon thereafter the intimation came that the passport would be granted. On November 19, 1931, matters were set in motion to carry out the deportation but when petitioner was sought for he was not available at Taylorton though he was evidently seen there about the end of that month. Eventually he was found at Weyburn on June 3 of this year, arrested and handed over to an immigration officer."

In his Reasons for Judgment Robson, J.A., stated at Page 33:

"The proceeding here was in effect a termination by Canada under its statutes, for reasons which its Parliament and authorities empowered for the purpose thought sufficient, of any sufferance upon which the petitioner had been allowed to enter and remain in Canada.

The right of expulsion of a foreign citizen whose presence if found to be objectionable does not seem to be conditional on the acquiescence of the country of the foreign citizenship but apparently international comity requires that communication take place. Such communication takes the form of passport application. At all events the practice to that effect does exist and must be recognized.

I do not see how, in these circumstances, the Canadian officials can be held to be chargeable with unjustifiable delay if in order to carry out such an important matter of communication they spend considerable time in seeking and obtaining the passport. While there is a long unexplained period, namely, from February to October, 1931, I cannot think that we can draw therefrom any inference of abandonment of the order against the petitioner. We cannot impute laches to the Crown.

After consideration, I do not think the words "shall be deported forthwith" in sec. 42 are a jurisdictional limitation. I think they are merely an indication of the consequence which results in case a person is found liable to deportation. The words are part of the sentence imposed."

In Rex v. Stachow 1932 2 W.W.R. at Page 698, an order to issue a writ of Habeas Corpus was granted where for no apparent reason the applicant was detained in custody for a period of five months and was held not "deported forthwith" within the meaning and spirit of the Act.

mining district where some friends were and where he got work. He observed the terms of the parole and ultimately asked that the parole be relaxed as in so reporting he was losing time from work. Nothing more seems to have been done about the passport until October 6, 1931, when an officer wrote the Consul General on the subject and soon thereafter the intimation came that the passport would be granted. On November 19, 1931, matters were set in motion to carry out the deportation but when petitioner was sought for he was not available at Taylorton though he was evidently seen there about the end of that month. Eventually he was found at Weyburn on June 3 of this year, arrested and handed over to an immigration officer."

A la page 33 J.A. Robson donne les motifs du jugement et déclare:

"The proceeding here was in effect a termination by Canada under its statutes, for reasons which its Parliament and authorities empowered for the purpose though sufficient, of any sufferance upon which the petitioner had been allowed to enter and remain in Canada.

The right of expulsion of a foreign citizen whose presence is found to be objectionable does not seem to be conditional on the acquiescence of the country of the foreign citizenship but apparently international comity requires that communication take place. Such communication takes the form of passport application. At all events the practice to that effect does exist and must be recognized.

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In re Poll 1937 W.W.R., Volume 3, Page 136 at Page 138 Embury, J., states:

'Now of course "forthwith" has a reasonable meaning, as the decisions show. I may say I have consulted all the decisions that were referred to me. I have not read them all in full, but I have consulted them all. I have read such parts of them as I deemed to be advisable. Now "forthwith" does not mean that a man has to be picked up no matter what the conditions are and deported and sent out of the country. It means having a regard to the general circumstances; that is, perhaps a man might be sick, perhaps a passport would have to be obtained, perhaps an order might have been made that his wife would have to go with him and a passport have to be obtained for her and arrangement made for her transportation. "Forthwith" means within a reasonable time, having regard to all the circumstances of the case, and the Act contemplates that the department shall have power to take all the circumstances into consideration when arriving at what is a proper time in which to deport a man in Poll's position."

### And further at Page 140:

"Their decision was made at a time when there was in existence a deportation order from which there had been an appeal. The appeal was dismissed. So the statute comes in and says he shall be deported forthwith, and then they come in without any authority under the law and say "under all the circumstances deportation proceedings will be suspended indefinitely as long as he does not again come unfavourably to the notice of the Department." In other words they say he shall not be deported. That in effect is what they say. In other words, they discontinue the proceedings. The effect of it is that the deportation order is not acted on, and it follows logically that the period which ensued after the writing of this letter and the making of this decision should not be taken into consideration and deducted from the five years which would naturally have run and so allowed this man to become domiciled in Canada."

In re Ferenc 1938 W.W.R., Volume 3 at Page 626 where the facts were similar to in re Poll. Writ of Habeas Corpus was granted and Robson, J.A., at Page 630 states:

"I think the Act shows a parliamentary intention that deportation proceedings shall be carried out with reasonable promptness; it cannot be the intention that deportation orders shall lie dormant for years ready to be revived at any time the department sees fit.

Dans l'affaire Rex c. Stachow 1932 2 W.W.R. à la page 698, une ordonnance d'émission de bref d'habeas corpus a été accordée car pour nulle raison apparente le demandeur a été mis sous garde pour une période de cinq mois et car il n'a pas été "expulsé immédiatement" en conformité du sens et de l'esprit de la Loi.

Dans l'affaire re Poll 1937 W.W.R., volume 3, pages 136 à 138 le juge Embury déclare:

"Now of course "forthwith" has a reasonable meaning, as the decisions show. I may say I have consulted all the decisions that were referred to me. I have not read them all in full, but I have consulted them all. I have read such parts of them as I deemed to be advisable. Now "forthwith" does not mean that a man has to be picked up no matter what the conditions are and deported and sent out of the country. It means having a regard to the general circumstances; that is, perhaps a man might be sick, perhaps a passport would have to be obtained, perhaps an order might have been made that his wife would have to go with him and a passport have to be obtained for her and arrangement made for her transportation. "Forthwith" means within a reasonable time, having regard to all the circumstances of the case, and the Act contemplates that the department shall have power to take all the circumstances into consideration when arriving at what is a proper time in which to deport a man in Poll's position."

## et à la page 140:

"Their decision was made at a time when there was in existence a deportation order from which there had been an appeal. The appeal was dismissed. So the statute comes in and says he shall be deported forthwith, and then they come in without any authority under the law and say "under all the circumstances deportation proceedings will be suspended indefinitely as long as he does not again come unfavourably to the notice of the Department." In other words they say he shall not be deported. That in effect is what they say. In other words, they discontinue the proceedings. The effect of it is that the deportation order is not acted on, and it follows logically that the period which ensued after the writing of this letter and the making of this decision should not be taken into consideration and deducted from the five years which would naturally have run and so allowed this man to become domiciled in Canada."

Dans l'affaire re Ferenc 1938 W.W.R., volume 3, à la page 626 les faits s'apparentent à ceux de l'affaire re Poll. Le bref d'habeas corpus est accordé et à la page 630 le J.A. Robson déclare:

The department should at least have put the alien under a permit as the Act sanctions where control is to be kept. The fact that the department took the second proceeding in the same form in 1937 shows its own view as to the vitality of the first order.

Common justice requires that the alien shall not remain in a state of uncertainty for perhaps years, and the obligation of the steamship company must surely end some time."

And in Rex v. Aubin 1923 W.W.R., Volume 1, Page 270 at Pages 271 and 272 Dennistoun, J.A., stated:

"In the case at bar the magistrate has jurisdiction, for the statute expressly confers it in cases of this kind. During the course of the enquiry, or prior to its opening, he is called upon to decide whether information has been given "forthwith". That is a question of fact. Granted that it means "immediately" or "as soon as possible" or "without delay", nevertheless the magistrate must, in his judgment, determine whether the information was laid in time, and may conclude that an interval of two months was not too long under the circumstances of the case, and his decision will not be open to question, except on appeal, for which the statute makes no provision.

Had the statute fixed a definite number of days within which the information must be laid, the Court on motion for certiorari, might conclude that he never had jurisdiction to enter upon an enquiry in a case where the information was not laid within the time fixed by the statute, but where the words of the statute commit to the judicial determination of the magistrate the period within which the information shall be laid, subject to a general direction that it shall be "forthwith", he has jurisdiction to enter upon the enquiry and to give a decision."

The Courts finds it reasonable to assume that the term "forthwith" as used in Section 42(3) supra is used in the same sense in Section 25 of the Immigration Act as now constituted.

In the instant case the Inquiry was held within twenty-eight days of the detention. The appellant was not physically detained; he was released and returned to his employment. He suffered no inconvenience, discomfort or hardship as a result of the delay of twenty-eight days. The Department, to convene an Inquiry which absorbs at least a morning or an afternoon, has to make a Special Inquiry Officer available together with a qualified interpreter, in this case Korean,

"I think the Act shows a parliamentary intention that deportation proceedings shall be carried out with reasonable promptness; it cannot be the intention that deportation orders shall lie dormant for years ready to be revived at any time the department sees fit.

The department should at least have put the alien under a permit as the Act sanctions where control is to be kept. The fact that the department took the second proceeding in the same form in 1937 shows its own view as to the vitality of the first order.

Common justice requires that the alien shall not remain in a state of uncertainty for perhaps years, and the obligation of the steamship company must surely end some time."

Dans l'affaire Rex c. Aubin 1923 W.W.R. volume 1, aux pages 270, 271 et 272 le J.A. Dennistoun a déclaré:

"In the case at bar the magistrate has jurisdiction, for the statute expressly confers it in cases of this kind. During the course of the enquiry, or prior to its opening, he is called upon to decide whether information has been given "forthwith". That is a question of fact. Granted that it means "immediately" or "as soon as possible" or "without delay", nevertheless the magistrate must, in his judgment, determine whether the information was laid in time, and may conclude that an interval of two months was not too long under the circumstances of the case, and his decision will not be open to question, except on appeal, for which the statute makes no provision.

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La Cour déclare qu'il est raisonnable d'assumer que le mot"immédiatement" tel qu'utilisé à l'article 42(3) supra est employé dans la même acception à l'article 25 de la Loi sur l'immigration dans sa présente forme.

Dans cette instance on a procédé à l'enquête dans les vingthuit jours de la détention. L'appelant n'était pas détenu physiquement; il a été libéré et il est retourné à son travail. Ce retard de and a reporter available. On balance it would appear to the Court that the Inquiry was held without unnecessary delay and in the reasonable course of ordinary conduct of the business of the Department. The Court having found that the Inquiry was held within a reasonable time under the circumstances of the case rejects counsel for the appellant's contention that the Special Inquiry Officer had lost jurisdiction to hold the Inquiry. Had the appellant been physically held in detention for this period, the Court's decision may be otherwise.

The second objection of the appellant viz: Departure of the vessel is also rejected.

In this respect the Court notes the remarks of Chairman J.V. Scott in the appeal of Michalis SANTAS, file 68-5953, where on Page 5 she states:

"The Board has frequently had occasion to refer to the unsatisfactory proof of the departure of the vessel in appeals from deportation orders based on section 19(1)(e)(x). The departure of the vehicle is a vital ingredient of this section, and adequate proof of departure should not be beyond the resources of the Minister of Manpower and Immigration.

It is true that section 64 of the Immigration Act reads "(1) Every document purporting to be a deportation order... is, in any proceeding under or arising out of this Act or the Immigration Appeal Board Act, admissible in evidence as prima facie proof of the facts contained therein ... " The Board has held that very little is required to shift the burden of proof imposed on the appellant by this section to the respondent, the Minister of Manpower and Immigration. However, in the instant appeal, the respondent's counsel at the inquiry, Mr. M. Landry, at that time a member of the Quebec Bar, admitted that the ship had left (Minutes of Inquiry, page 6), and this, combined with the improbability, almost impossibility, that the ship has not departed from Canada since the appellant's desertion in 1964, leaves the Board with no alternative but to accept paragraph 4 of the deportation order as prima facie proof of the facts alleged therein."

At Page 7, Minutes of Inquiry, in response to questions by the Special Inquiry Officer the appellant stated:

- "Q. Were you on board the M/V Grand Loyal when it left Canada?
- A. I couldn't be on board, I wasn't there, I was absent.
- Q. Then you were not on board that boat when it left Montreal. Is that correct?
- A. Yes, that is correct."

vingt-huit jours ne l'a ni dérangé ni incommodé, et ne lui a pas causé de tribulations. Afin de procéder à l'enquête, ce qui a occupé au moins un après-midi, le ministère a dû rendre disponible un enquêteur spécial ainsi qu'obtenir les services d'un interprète coréen compétent, et ceux d'un greffier. D'après ceci, il semble à la Cour que l'enquête a été tenue sans retard inutile et au rythme raisonnable des affaires courantes du ministère. La Cour ayant trouvé que l'enquête a été tenue dans une période de temps raisonnable rejette le point de litige soulevé par le conseiller de l'appelant à savoir que l'enquêteur spécial avait perdu sa compétence de tenir l'enquête. Si pendant vingt-huit jours l'appelant avait été détenu physiquement la décision de la Cour aurait pû être autre.

Le second point de litige soulevé par l'appelant est le suivant: le départ du navire est contesté.

À ce sujet la Cour tient compte des remarques faites par le président J.V. Scott dans l'appel de Michalis SANTAS, dossier no. 68-5953. A la page 5 le président déclare:

"The Board has frequently had occasion to refer to the unsatisfactory proof of the departure of the vessel in appeals from deportation orders based on section 19(1)(e)(x). The departure of the vehicle is a vital ingredient of this section, and adequate proof of departure should not be beyond the resources of the Minister of Manpower and Immigration.

It is true that section 64 of the Immigration Act reads "(1) Every document purporting to be a deportation order... is, in any proceeding under or arising out of this Act or the Immigration Appeal Board Act, admissible in evidence as prima facie proof of the facts contained therein ... " The Board has held that very little is required to shift the burden of proof imposed on the appellant by this section to the respondent, the Minister of Manpower and Immigration. However, in the instant appeal, the respondent's counsel at the inquiry, Mr. M. Landry, at that time a member of the Quebec Bar, admitted that the ship had left (Minutes of Inquiry, page 6), and this, combined with the improbability, almost impossibility, that the ship has not departed from Canada since the appellant's desertion in 1964, leaves the Board with no alternative but to accept paragraph 4 of the deportation order as prima facie proof of the facts alleged therein."

À la page 7 du procès-verbal de l'enquête, l'appelant interrogé par l'enquêteur spécial a déclaré:

"Q. Were you on board the M/V Grand Loyal when it left Canada?
A. I couldn't be on board, I wasn't there, I was absent.

Filed at the Inquiry as Exhibit 'D'' was a Crew Index Card which showed that the appellant had remained ashore without permission, was classed as a deserter and that a deposit was made by the ship or its agents of \$500.00.

At the hearing of the appeal counsel for the respondent filed with the Court a Statutory Declaration which stated:

"I, B. Rowson, employees of the Transocean Shipping & Coal Company Inc., Montreal, Que., do solemnly and voluntarily declare that: The ship Grand Loyal left from Shed 25, Montreal Harbour at 22.30 hours on October 25th, 1968 destined to Far East Ports via Quebec."

This declaration was filed in accordance with the provisions of Section 7(2)(c) of the Immigration Appeal Board Act which provides:

"7(2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may

(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

The Court notes the date of departure as October 25, 1968 and realizes this may be a typographical error. However ignoring the contents of this affidavit, the cumulative effect of the appellant's admission, the Crew Index Card, the improbability of the vessel remaining in port for a period of over two years, and on the balance of probabilities the Court finds as a fact that the vessel has departed from Canada.

As to eluding examination the Court finds on the evidence as a whole and particularly the evidence at Pages 7 and 8 of the Inquiry that this ground has been proved to the satisfaction of the Court.

The appellant admits he is not a Canadian citizen and further admits that he has not acquired Canadian domicile.

The Court therefore finds that the order as a whole has been made in accordance with the Immigration Act and regulations thereunder and dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

- Q. Then you were not on board that boat when it left Montreal. Is that correct?
- A. Yes, that is correct."

On a versé à l'enquête en pièce à l'appui 'D' une carte indicatrice d'équipage qui montre que l'appelant est resté à terre sans autorisation, qu'il est classé déserteur, et qu'une caution de \$500.00 a été déposée par la compagnie maritime ou ses représentants.

À l'audition de l'appel le conseiller de l'intimé a déposé aurpès de la Cour la déclaration statutaire suivante:

"I, B. Rowson, employee of the Transocean Shipping & Coal Company Inc., Montreal, Que., do solemnly and voluntarily declare that: The ship Grand Loyal left from Shed 25, Montreal Harbour at 22.30 hours on October 25th, 1968 destined to Far East Ports via Quebec."

Cette déclaration a été déposée en conformité des dispositions de l'article 7(2)(c) de la Loi sur la Commission d'appel de l'immigration qui stipule:

"7(2) La Commission a, en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des documents, l'exécution de ses ordonnances et autres questions nécessaires ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives et, sans limiter la généralité de ce qui précède, peut

(c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie.

La Cour remarque que la date du départ du navire est le 25 octobre 1968 et elle estime qu'il s'agit peut être d'une coquille typographique. Toutefois, ne tenant pas compte du contenu de cet affidavit, mais considérant l'effet cumulatif de l'admission de l'appelant, de la carte indicatrice d'équipage et de l'improbabilité qu'un navire reste au port pour une période de plus de deux ans, considérant aussi l'équilibre des probabilités la Cour déclare qu'en fait le navire a quitté le Canada.

Quant au motif soutenant que l'appelant s'est dérobé à l'examen la Cour déclare que l'ensemble de la preuve et en particulier les pages 7 et 8 de l'enquête l'ont convaincu du bien-fondé de ce motif. As to the equitable jurisdiction of the Court the appellant is not a permanent resident and the Court's considerations are restricted to Section 15(1)(b) of the Immigration Appeal Board Act which provides:

- "15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
  - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
    - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
    - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The appellant's parents, one sister and seven brothers are in Korea. He states that he has been assisting them as his parents are both unemployed. He is single, has a Grade 10 education, was an engine operator for one year, served three years in the Army and then became a seaman. From the evidence it appears that he is aggressive and received several promotions while on ship board. He is presently employed in Canada as an engine assembler at \$3.00 an hour with a take home pay of approximately \$100.00 per week. In his evidence he told the Court that if he were returned to Korea he would be under investigation and possibly have to serve some time in prison for deserting his ship. This however is not political persecution but merely prosecution for infringement of shipping laws. He has savings of \$4,000.00 and appears to be industrious, hardworking and no doubt be better off in Canada than in Korea: however these are not grounds or reasons for the Court granting special relief. The appellant is not established in Canada, has no relatives in this country, is not vital to any Canadian interest and the Board therefore directs that the deportation order be carried out as soon as practicable.

Dated at Ottawa, this 13th day of March 1970. Concurred in by: Miss J.V. Scott, and Lucien Cardin.

For the appellant: Fred Kan, Barrister and Solicitor;

L'appelant a admis qu'il n'était pas canadien et qu'il n'a pas acquis le domicile canadien.

En conséquence la Cour déclare que l'ordonnance d'expulsion dans son ensemble a été rendue en conformité de la Loi sur l'immigration et de ses règlements et la Cour rejette l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration.

Quant à la juridiction d'équité de la Cour, l'appelant n'étant pas un résident permanent l'étude de la Cour se limite à l'article 15(1)(b) de la Loi sur la Commission d'appel de l'immigration qui stipule:

- "15.(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
  - (b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordennance d'expulsion, compte tenu
    - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
    - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

Les parents de l'appelant, sa soeur et ses sept frères sont en Corée. Il a déclaré qu'il subvient aux besoins de ses parents, ceux-ci ne travaillant pas. Il est célibataire, a une éducation du niveau de la dixième année, a été mécanicien pendant un an, a servi pendant trois ans dans l'armée et ensuite est devenu marin. La preuve montre qu'il est entreprenant et qu'il a obtenu plusieurs fois de l'avancement lorsqu'il était a bord du navire. Au Canada il est actuellement employé en tant que monteur de moteur pour un salaire horaire de \$3.00 ce qui lui donne un revenu net hebdomadaire d'environ \$100.00.

Dans son témoignage, il a déclaré à la Cour que s'il retournait en Corée, serait lancée contre lui une enquête de laquelle résulterait peut être une peine d'emprisonnement vu qu'il a déserté son navire. Toutefois ceci n'est pas une punition pour des activités à caractère politique mais tout au plus une punition pour avoir enfreint les lois maritimes. Il a épargné \$4,000.00 et il semble être bon travailleur et sans aucun doute il gagnerait plus d'argent au Canada qu'en Corée; toutefois ceci ne constitue pas des motifs ou raisons que la Cour retient pour accorder un redressement spécial. L'appelant n'a pas noué de liens solides au Canada, il n'y a pas de parenté, sa présence n'est pas indispensable pour quelque intérêt canadien, en conséquence la Commission ordonner que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Fait à Ottawa le 13 mars 1970.

Ont souscrit: Mlle J.V. Scott et Lucien Cardin.

Pour l'appelant: Me Fred Kan; Pour l'intimé: M. W. Bernhardt. 30.
Dimitrios DRITSOPOULOS,

appellant,

ν.

The Minister of Manpower and Immigration,

intimé.

Date of the decision: January 19, 1970; File: 69-795.

Coram: Jean-Pierre Houle, Vice-Chairman, Gérard Legaré, F. Glogowski.

Crime - Judicial admission of guilt - insufficient evidence as to the existence and the seriousness - Immigration Act: 5(d); Criminal Code: 296.

Held: Since the indictment and the judgment of the tribunal are unavailable, the Board must refer to Canadian Law, and under section 296 of the Criminal Code of Canada no one may be condemned for receiving unless it is shown in evidence that the accused knew that the things had been criminally obtained and there is no such evidence in the record.

Although the appellant had the onus of proof as to whether he was a member of a prohibited class of persons, the grounds of deportation must be supported by sufficient evidence to allow the identification of that which the appellant has been condemned for. The appellant's admission that he has been found guilty is but one element of the evidence pertaining to the ground of deportation under section  $5(\mathbf{d})$ . It was also necessary to show whether or not the crime involved moral turpitude. The Board must therefore hold that there is not sufficient evidence to determine precisely enough whether or not there was a crime if so how serious it was.

The judgment of the Board was delivered by:

Gérard Legaré:

This is an appeal from a deportation order made in Montreal on April 19, 1969, by Special Inquiry Officer L.G. Rivard against the appellant, Dimitrios Dritsopoulos in the following terms:

- "1) vous n'êtes pas un citoyen canadien;
- yous n'êtes pas une personne ayant acquis le domicile canadien;
- 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (d) de l'article 5 de la Loi sur l'immigration en ce que vous admettez avoir été déclaré coupable d'un crime impliquant turpitude morale et votre admission au Canada n'a pas été autorisée par le gouverneur en conseil;

30. Dimitrios DRITSOPOULOS.

appelant,

C.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 19 janvier 1970; Dossier: 69-795.

Coram: Jean-Pierre Houle, vice-président, Gérard Legaré, F. Glogowski.

Crime - aveu judiciaire - preuve insuffisante de l'existence et de la gravité. - Loi sur l'immigration: 5(d); code criminel: 296.

Arrêt: A défaut de l'acte d'accusation ou de l'arrêt du tribunal la Cour doit s'en référer à la Loi canadienne et d'après l'article 296 du Code criminel du Canada, personne ne peut être condamné pour recel à moins que la preuve soit faite que l'accusé savait qu'il s'agissait de choses criminellement obtenues, et cette preuve n'existe pas au dossier.

Même si l'appelant a le fardeau de prouver qu'il ne faisait pas partie d'une classe de personnes prohibées, il faut que les motifs d'expulsion s'appuient sur des éléments de preuve suffisante qui permettent d'identifier ce dont l'appelant dit avoir été déclaré coupable. L'aveu à l'effet que l'appelant fut déclaré coupable n'est cependant qu'un des éléments nécessaires à la preuve du motif d'expulsion en vertu de l'article 5(d). Il fallait aussi déterminer si le crime impliquait turpitude morale. La Cour conclut que la preuve ne permet pas de déterminer avec précision suffisante, d'abord qu'il y a eu crime et advenant l'affirmative un crime de quelle gravité.

Le jugement de la Commission fut rendu par:

# Gérard Legaré:

Appel d'une ordonnance d'expulsion rendue à Montréal le 19 avril 1969 par l'enquêteur spécial L.G. Rivard contre l'appelant Dimitrios Dritsopoulos dans les termes suivants:

"1) vous n'êtes pas un citoyen canadien;

2) vous n'êtes pas une personne ayant acquis le domicile canadien:

3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (d) de l'article 5 de la Loi sur l'Immigration en ce que vous admettez avoir été déclaré coupable d'un crime impliquant turpitude morale et votre admission au Canada n'a pas été autorisée par le gouverneur en conseil; 4) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:

 a) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements

de la Loi sur l'immigration."

The appellant was present at the hearing and gave testimony. He was assisted by counsel, Me Harry Blank, from Montreal. The Minister was represented by M. Jacques Pépin from the Department of Manpower and Immigration.

The appellant is a 38 years old Greek citizen. After 9 years of schooling he has worked in a textile factory until 1962. He then left for Germany where he was employed for four years as a welder-electrician. In 1967 he went to Belgium where he became an apprentice-cook and on February 22, 1968 he came to Canada as a visitor. Before the expiration of his visitor's permit, which was renewed twice, he filed application for permanent residence as an immigrant. His application was processed and it would appear, according to the minutes of the inquiry, that he has met the norms of assessment set out by the Department since he was asked to submit to a medical examination and was granted a working permit.

On December 10, 1968, nine months after his application for admission had been examined, the appellant was summoned to the Department of Manpower and Immigration where he signed, witnessed by an official, but in unknown circumstances, the following statutory declaration:

"Je, Demetre Dritsopoulos, né le 30 novembre 1932 à Katsarov, Grèce, résidence 5950 Parc ave, app. 8, Montréal, profession pâtissier, déclare solennellement que: le 31 août 1966 à Kassel Allemagne, j'ai été condamné à 5 mois d'emprisonnement (avec sursis) pour avoir acheté 3 bagues et 2 montres et un collier, d'un inconnu, qui s'était présenté à moi sous de fausses représentations. J'ai acheté le tout pour la somme de cent marks, de bonne foi. Toutefois vu ma bonne conduite, je n'ai fait que 25 jours de prison, ce après quoi j'ai été relâché.

Ceci est un incident regrettable dans ma vie et qui me servira de leçon de ne jamais acheter de la camelote d'un inconnu. Depuis cet incident je n'ai jamais eu affaire avec la police. Ce fut la première et la dernière fois. Je nie donc avec véhémence l'accusation de "aggravated theft" ou vol qualifié, selon des informations que vous auriez reçues."

- 4) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:
  - a) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration."

L'appelant était présent à l'audition et rendit témoignage. Il était assisté d'un procureur, Me Harry Blank, Montréal. M. Jacques Pépin, du ministère de la Main-d'oeuvre et de l'Immigration, occupait pour le ministre.

L'appelant est citoyen grec et âgé de 38 ans. Après 9 années d'étude il travaille dans une manufacture de textile jusqu'en 1962. Il part alors pour l'Allemagne où il est embauché durant quatre ans comme soudeur-électricien. En 1967, il se rend en Belgique faire un apprentissage comme cuisinier et le 22 février 1968, il arrive au Canada comme visiteur. Avant l'expiration de son permis de séjour qui a été prolongé à deux reprises, il dépose une demande d'admission permanente comme immigrant. Sa demande est étudiée et il semblerait, d'après le procès-verbal de l'enquête, qu'il aurait rencontré les normes d'appréciation du ministère puisqu'il est invité à subir l'examen médical et qu'un permis de travail lui est remis.

Le 10 décembre 1968, soit 9 mois après avoir fait sa demande d'admission et avoir été examiné, l'appelant est convoqué au ministère de la Main-d'oeuvre et de l'Immigration où il signe, devant un fonctionnaire, mais dans des circonstances non décrites, la déclaration statutaire suivante:

"Je, Demetre Dritsopoulos, né le 30 novembre 1932 à Katsarov, Grèce, résidence 5950 Parc ave, app. 8, Montréal, profession patissier, déclare solennellement que: le 31 août 1966 à Kassell Allemagne, j'ai été condamné à 5 mois d'emprisonnement (avec sursis) pour avoir acheté 3 bagues et 2 montres et un collier, d'un inconnu, qui s'était présenté à moi sous de fausses représentations. J'ai acheté le tout pour la somme de cent marks, de bonne foi. Toutefois vu ma bonne conduite, je n'ai fait que 25 jours de prison, ce après quoi j'ai été relâché.

Ceci est un incident regrettable dans ma vie et qui me servira de leçon de ne jamais acheter de la Camelote d'un inconnu. Depuis cet incident je n'ai jamais eu affaire avec la police. Ce fut la première et la dernière fois. je nie donc avec véhémence l'accusation de "aggravated theft" ou vol qualifié, selon des informations que vous auriez reçues." On the day following this declaration, on December 11, 1968, Immigration handed out a report under section 23 of the Immigration Act (exhibit "A"), in which report it was specified, among other things, that the appellant could not be admitted as an immigrant due to the fact that he had been found guilty of a criminal offence involving moral turpitude and that he consequently fell within the prohibited class described in section 5(d) of the Immigration Act:

"5(d) Persons who have been convicted of or admit having committed any crime involving moral turpitude..."

An inquiry was held on April 17, 1969 and the above-mentioned deportation order was made.  $\,$ 

The Board realizes that it must decide on the future of a young man who has shown the intention of settling permanently in Canada, having taken all the necessary steps to that end and having met all the admission requirements as set out in section 34(3) of the Immigration Regulations and having been found to be admissible. On the other hand, he cannot be admitted if he is a member of a prohibited class described in section 5 of the Immigration Act. The respondent charges him with being a member of the prohibited class described in the above quoted section 5(d).

Has the appellant committed a crime and if so did this crime involve moral turpitude? The only document on which the Special Inquiry Officer could base his deportation order was the statutory declaration written by the Immigration officer and signed by the appellant (exhibit G). In this declaration the appellant states: "le 31 août 1966 à Kassel Allemagne, j'ai été condammé à 5 mois d'emprisonnement (avec sursis) pour avoir acheté trois bagues, deux montres et un collier, d'un inconnu qui s'était présenté à moi sous de fausses représentations. J'ai acheté le tout pour la somme de 100 marks, de bonne foi. Toutefois, vu ma bonne conduite, je n'ai fait que 25 jours de prison, ce après quoi j'ai été relâché."

Therefore the appellant has admitted having bought things from a stranger and having been condemned by a tribunal. Consequently, there has been an offence under German Law but the evidence does not allow us to determine precisely enough what kind of an offence.

In his testimony at the inquiry and at the hearing of the appeal, the appellant has described the circumstances of his condemnation. Pages 9 and 10 of the minutes of the inquiry:

- "Q. Monsieur Dritsopoulos, auriez-vous déjà été arrêté par la police?
- R. Oui.
- Q. A quelle occasion?

Le lendemain de la signature de cette déclaration, soit le 11 décembre 1968, un rapport est émis par l'Immigration sous l'article 23 de la Loi de l'Immigration (pièce "A"), rapport spécifiant entre autres que l'appelant ne serait pas admissible comme immigrant dû au fait qu'il aurait été trouvé coupable d'un délit criminel impliquant turpitude morale se classant ainsi dans la catégorie interdite décrite à l'article 5(d) de la Loi de l'Immigration.

"5(d) Les personnes qui ont été déclarées coupables de quelque crime impliquant turpitude morale, ou qui admette avoir commis un tel crime ....".

Une enquête est tenue le 17 avril 1969 et l'ordonnance d'expulsion mentionnée plus haut est émise.

La Cour se rend compte qu'elle a à décider de l'avenir d'un jeune homme qui a manifesté le désir de s'établir en permanence au Canada, qui a franchi toutes les étapes pour atteindre cette fin, qui répond à toutes les conditions d'admissibilité de l'article 34(3) des Règlements de l'Immigration, partie I et qui, en définitive, est admissible. Mais il ne peut être admis, d'autre part, que s'il n'est pas membre de l'une des catégories interdites décrite à l'article 5 de la Loi de l'Immigration. L'intimé lui reproche d'être un membre de la catégorie décrite au paragraphe (d) de l'article 5 déjà reproduit.

L'appelant a-t-il commis un crime et dans l'affirmative s'agis-sait-il d'un crime impliquant turpitude morale? L'enquêteur spécial qui a émis l'ordonnance d'expulsion n'avait pour tout document que la déclaration statutaire rédigée par le fonctionnaire à l'Immigration et signée par l'appelant (pièce G). Dans cette déclaration l'appelant dit: "le 31 août 1966 à Kassel Allemagne, j'ai été condamné à 5 mois d'emprisonnement (avec sursis) pour avoir acheté trois bagues, deux montres et un collier, d'un inconnu qui s'était présenté à moi sous de fausses représentations. J'ai acheté le tout pour la somme de 100 marks, de bonne foi. Toutefois, vu ma bonne conduite, je n'ai fait que 25 jours de prison, ce après quoi j'ai été relâché."

Donc l'appelant a confessé avoir acheté des choses d'un inconnu et d'avoir été condamné par les tribunaux. Il y a donc eu infraction à une loi de l'Allemagne mais la preuve ne permet pas de déterminer avec précision suffisante quel genre d'infraction.

Dans son témoignage à l'enquête et à l'audience de l'appel, l'appelant a relaté les circonstances de sa condamnation.

Pages 9 et 10 de l'enquête:

'Q. Monsieur Dritsopoulos, auriez-vous déjà été arrêté par la police?

R. Oui.

- R. La police m'a fait arrêter pour vérifier si j'avais commis un acte criminel de vol parce que j'avais acheté moi-même des objets, quantité (5) sans savoir d'où ils provenaient et ne connaissant pas la personne même qui me les a vendus.
- Q. Quel était l'acte d'accusation?
- R. Pourquoi j'ai acheté ces objets sans connaissance d'où ils provenaient.
- Q. Avez-vous été traduit en Cour?
- R. Oui.
- Q. Quel était l'acte d'accusation qu'on vous a lu devant le Tribunal?
- R. L'accusation était pour avoir acheté des objets dont je ne connaissais pas la provenance et puis j'ai dû servir 5 mois de prison avec sursis.
- Q. Avez-vous plaidé coupable ou non coupable?
- R. J'ai plaidé coupable que j'ai acheté les objets moimême.
- Q. Quelle a été la condamnation?
- R. Quand j'ai été arrêté j'ai été en prison pour 27 jours et puis durant les 27 jours on a trouvé les coupables, on m'a laissé libre et 6 mois plus tard j'ai été convoqué pour me présenter en Cour, c'est alors qu'on m'a donné 3 ans de probation et 5 mois de prison avec sursis, j'ai été laissé libre.
- Q. Pouvez-vous me dire s'il s'agissait d'une accusation selon le code criminel de ce pays?
- R. Oui.
- Q. Dans quel pays ces événements se sont-ils produits?
- R. Kassel, Allemagne.
- Q. Vous rappellez-vous vers quelle date vous avez été arrêté?
- R. 1965 ou 1966, je ne me souviens pas.
- Q. Est-ce que vous avez respecté les conditions de votre probation?
- R. Oui.
- Q. Vous dites que ces événements se sont produits en 1965 ou 1966, quand avez-vous quitté l'Allemagne?
- R. En 1967.

- Q. A quelle occasion?
- R. La police m'a fait arrêté pour vérifier si j'avais commis un acte criminel de vol parce que j'avais acheté moi-même des objets, quantité (5) sans savoir d'où ils provenaient et ne connaissant pas la personne même qui me les a vendus.
- Q. Quel était l'acte d'accusation?
- R. Pourquoi j'ai acheté ces objets sans connaissance d'où ils provenaient.
- Q. Avez-vous été traduit en Cour?
- R. Oui.
- Q. Quel était l'acte d'accusation qu'on vous a lu devant le Tribunal?
- R. L'accusation était pour avoir acheté des objets dont je ne connaissais pas la provenance et puis j'ai dû servir 5 mois de prison avec sursis.
- Q. Avez-vous plaidé coupable ou non coupable?
- A. J'ai plaidé coupable que j'ai acheté les objets moi-même.
- Q. Quelle a été la condamnation?
- R. Quant j'ai été arrêté j'ai été en prison pour 27 jours et puis durant les 27 jours on a trouvé les coupables, on m'a laissé libre et 6 mois plus tard j'ai été convoqué pour me présenter en Cour, c'est alors qu'on m'a donné 3 ans de probation et 5 mois de prison avec sursis, j'ai été laissé libre.
- Q. Pouvez-vous me dire s'il s'agissait d'une accusation selon le code criminel de ce pays?
- R. Oui.
- Q. Dans quel pays ces événements se sont-ils produits?
- R. Kassel, Allemagne.
- Q. Vous rappellez-vous vers quelle date vous avez été arrêté?
- R. 1965 ou 1966, je ne me souviens pas.
- Q. Est-ce que vous avez respecté les conditions de votre probation?
- R. Oui.
- Q. Vous dites que ces événements se sont produits en 1965 ou 1966, quand avez-vous quitté l'Allemagne?
- R. En 1967.
- Q. Est-ce que vous auriez averti les personnes responsables de votre probation que vous quittiez le pays?
- R. Oui."

- Q. Est-ce que vous auriez averti les personnes responsables de votre probation que vous quittiez le pays?
- R. Oui."

# Pages 2 and 3 of the appeal:

### 'M. BLANK:

- Q. Mr. Dritsopoulos, I show you Exhibit "G" in the record, that is a statutory declaration. Do you remember signing this declaration.
- A. Yes.
- Q. I will read the first few lines form the declaration:
  "Le 31 août 1966 à Kassel, Allemagne, j'ai été condammé
  à 5 mois d'emprisonnement --- for having bought three
  rings and two watches and a necklace from an unknown
  which was presented to me under false pretences."
  Is that what you were convicted of in Germany?
- A. Yes.
- Q. I notice on page 9 of the evidence, half way down the page, you state that the police arrested you to see:

  "To see if I committed a criminal act of theft because I had purchased five objects without knowing from where they came, not knowing the person from whom they were sold."
  - Is that correct?
- A. Yes.
- Q. Further down, on the same page, the inquiry officer asked you "on what charge did you appear before the tribunal?" and you answered "The charge was having purchased objects of which I did not know from whence they came and I was ordered to serve five months of prison with sursis."?
- A. Yes.
- Q. On page 11 of the same inquiry, I notice that the inquiry was adjourned and in afternoon you were shown a statutory declaration and you were asked the question I'll read it in French:

"Est-ce que l'accusation aurait été pour recel de marchandise?" and you answered "yes"?

- A. That thing I did not know.
- Q. Do you know what "recel" or receiving stolen merchandise means?
- A. I have never in my life done this and I did not know that these items were stolen.

## Page 2 et 3 de l'appel:

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- A. Yes.
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  5 mois d'emprisonnement --- for having bought three rings
  and two watches and a necklace from an unknown which was
  presented to me under false pretences."

Is that what you were convicted of in Germany?

- A. Yes.
- Q. I notice on page 9 of the evidence, half way down the page, you state that the police arrested you to see: "To see if I committed a criminal act of theft because I had purchased five objects without knowing from where they came, not knowing the person from whom they were sold."

Is that correct?

- A. Yes.
- Q. Further down, on the same page, the inquiry officer asked you "on what charge did you appear before the tribunal?" and you answered "The charge was having purchased objects of which I did not know from whence they came and I was ordered to serve five months of prison with sursis."?
- A. Yes.
- Q. On page 11 of the same inquiry, I notice that the inquiry was adjourned and in afternoon you were shown a statutory declaraction and you were asked the question, I'll read it in French:

"Est-ce que l'accusation aurait été pour recel de marchandise?"

and you answered "yes"?

- A. That thing I did not know.
- Q. Do you know what "recel" or receiving stolen merchandise means?
- A. I have never in my life done this and I did not know that three items were stolen.

- Q. When the officer asked you that question, did he define the interpretation of "receiving" under the Canadian Criminal Code?
- A. I don't think I realized or understood exactly the question.
- Q. Did he tell you that receiving under the Criminal Law means having under your possession stolen goods, merchandise, knowing it to have been stolen?
- A. I did not know or even thought for a minute that these items were stolen.
- Q. I'm asking you when you answered the question you said "yes". When you said "yes" to receiving merchandise did you know that that meant that you had in your possession merchandise which was stolen and you knew that it was stolen?
- A. I insisted many times and I mentioned many times that I did not know that these items were stolen and my conscience would not have allowed me to have bought things that were stolen."

Does this testimony given by the appellant allow us to conclude that he was accused of and condemned for receiving? To reach that conclusion, it would have to be shown that the appellant has been found in possession of the things criminally obtained. The Criminal Code of Canada states that:

- "296. Every one commits an offence who has anything in his possession knowing that it was obtained
  - (a) by the commission in Canada of an offence punishable by indictment, or
  - (b) by an act or omission anywhere that, if it had occured in Canada, would have constituted an offence punishable by indictment.

Since the indictment and the judgment of the tribunal are unavailable, the Board must refer to Canadian law, and under section 296 of the Criminal Code of Canada, no one may be condemned for receiving unless it is shown in evidence that the accused knew that the things had been criminally obtained and there is no such evidence in the record.

At page 11 of the minutes of inquiry, the Special Inquiry Officer has skillfully made the appellant admit to an accusation for receiving. Asked: "Est-ce que l'accusation avait été pour recel de marchandises?", the appellant answered, "Oui". This question was asked after he had repeated that he did not know that the goods had been stolen. The Board must take into account the fact that the appellant was not able to evaluate the exact meaning of the question and the bearing of his answer. And furthermore, he was not represented by legal counsel.

- Q. When the officer asked you that question, did he define the interpretation of "receiving" under the Canadian Criminal Code?
- A. I don't think I realized or understood exactly the question.
- Q. Did he tell you that receiving under the Criminal Law means having under your possession stolen goods, merchandise, knowing it to have been stolen?
  - A. I did not know or even thought for a minute that these items were stolen.
  - Q. I'm asking you when you answered the question you said "yes". When you said "yes" to receiving merchandise did you know that that meant that you had in your possession merchandise which was stolen and you knew that it was stolen?
  - A. I insisted many times and I mentioned many times that I did not knew that these items were stolen and my conscience would not have allowed me to have bought things that were stolen."

Ce témoignage de l'appelant peut-il permettre de conclure qu'il a été accusé et condamné pour recel? Pour en venir à cette conclusion il faudrait que l'appelant ait été trouvé en possession de biens criminellement obtenus. Le Code criminel du Canda dit:

- "296. Commet une infraction, quiconque a en sa possession quelque chose, sachant que cette chose a été obtenue
  - (a) par la perpétration, au Canada, d'une infraction punissable sur acte d'accusation; ou
  - (b) par une action ou omission en quelque endroit que ce soit, qui aurait constitué, si elle avait eu lieu au Canada, une infraction punissable sur acte d'accusation."

À défaut de l'acte d'accusation ou de l'arrêt du tribunal, la Cour doit s'en référer à la Loi canadienne et d'après l'article 296 du Code criminel du Canada, personne ne peut être condamné pour recel à moins que la preuve soit faite que l'accusé savait qu'il s'agissait de choses criminellement obtenues, et cette preuve n'existe pas au dossier.

À la page 11 du procès-verbal de l'enquête, l'enquêteur spécial a habilement amené l'appelant à reconnaître une accusation de recel. À la question "Est-ce que l'accusation aurait été pour recel de marchandise?" la réponse fut "Oui". La question lui fut posée après qu'il eut répété qu'il ignorait qu'il s'agissait de marchandises volées. La Cour doit tenir compte du fait que l'appelant n'avait pas la capacité d'évaluer le sens précis de la question et la portée de la réponse et que de plus il n'était pas représenté par un conseiller juridique.

Has Dritsopoulos been condemned for receiving or for another offence involving moral turpitude? There is no evidence to answer this question. Although the appellant had the onus of proof as to whether he was a member of a prohibited class of persons, the grounds of the deportation must be supported by sufficient evidence to allow the identification of that for which the appellant has been condemned. The appellant's admission that he has been found guilty is but one element of the evidence pertaining to the ground of deportation under section 5(d). It was also necessary to show whether or not the crime involved moral turpitude. The Board must therefore hold that there is not sufficient evidence to determine precisely enough whether or not there was a crime and if so of what gravity was that crime.

In order to determine the gravity of the crime, if there was such a crime, the Board can only refer to the sentence meted out against the appellant in Germany. He himself has admitted (page 9 of the inquiry) having been condemned to five months in prison, having been released after 27 days having been summoned again before the Court and condemend to three years of probation and five months of prison, which was stayed "parce qu'on avait trouvé les coupables." Finally, he was detained for 27 days and the evidence does not show conclusively that the 27 day detention was not while awaiting trial.

Was the Special Inquiry Officer justified at the inquiry in concluding that the crime of which the appellant had been accused involved moral turpitude? It is important for the Board to determine whether the appellant has been found guilty or has admitted having committed a crime involving moral turpitude. In the case of Brooks (1945 1 D.L.R.), where the Special Inquiry Officer had before him no evidence as to foreign law, judge, C.J. Rose of the Supreme Court of Ontario stated, at page 731:

"Foreign law is a fact to be proved, and, there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non vult, I do not think that Mr. Malcolm had before him any evidence that Brooks had in the United States 20 years ago been convicted of anything. And even if the record could be treated as evidence of a conviction of some offence, I think it could not be treated as evidence of a conviction of a crime involving moral turpitude, because Mr. Malcolm had not before him any evidence as to what is requisite in New Jersey to constitute the offence of "receiving". What is so requisite may or may not be receiving stolen goods knowing them to be stolen: without knowing the definition of the offence it seems to be very rash to assume that it constitutes a crime involving moral turpitude."

The Board totally agrees with the grounds put forward by the learned judge Rose and accepts on this point the appeal of Dritsopoulos. In the second ground for deportation it is charged that the appellant is

Dritsopoulos a-t-il été accusé et condamné pour retention ou pour un autre délit impliquant turpitude morale? Rien dans la preuve ne répond à cette question. Même si l'appelant a le fardeau de prouver qu'il ne faisait pas partie d'une classe de personnes prohibées, il faut que les motifs d'expulsion s'appuient sur des éléments de preuve suffisants qui permettent d'identifier ce dont l'appelant dit avoir été déclaré coupable. L'aveu à l'effet que l'appelant fut déclaré coupable n'est cependant qu'un des éléments nécessaires à la preuve du motif d'expulsion en vertu de l'article 5(d). Il fallait aussi déterminer si le crime impliquait turpitude morale. La Cour doit donc conclure que la preuve ne permet pas de déterminer avec précision suffisante, d'abord s'il y a eu crime et advenant l'affirmative, un crime de quelle gravité.

Pour tenter d'évaluer la gravité du crime, s'il y a eu crime, la Cour ne peut ici que référer à la sentence rendue contre l'appelant en Allemagne. Selon son propre aveu (page 9 de l'enquête), l'appelant a été condamné à cinq mois d'emprisonnement, fut libéré après 27 jours, convoqué de nouveau devant la Cour et condamné à trois ans de probation et cinq mois de prison avec sursis "parce qu'on aurait trouvé les coupables". En définitive, il n'a été détenu que 27 jours et la preuve n'exclut pas la possibilité que cette détention de 27 jours n'ait été que préventive.

Lors de l'enquête, l'enquêteur spécial était-il justifié de conclure que le crime reproché à l'appelant impliquait turpitude morale? Il importe à la Cour de déterminer si l'appelant a été déclaré coupable ou a admis avoir commis un crime impliquant turpitude morale. Dans la cause de Brooks (1945 l D.L.R., où l'enquêteur spécial n'avait devant lui aucune preuve quant à la loi étrangère, le juge C.J. Rose de la Cour suprême de l'Ontario déclare à la page 731:

"Foreign law is a fact to be proved, and, there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non vult, I do not think that Mr. Malcolm had before him any evidence that Brooks had in the United States 20 years ago been convicted of anything. And even if the record could be treated as evidence of a conviction of some offence, I think it could not be treated as evidence of a conviction of a crime involving moral turpitude, because Mr. Malcolm had not before him any evidence as to what is requisite in New Jersey to constitute the offence of "receiving". What is so requisite may or may not be receiving stolen goods knowing them to be stolen: without knowing the definition of the offence it seems to be very rash to assume that it constitutes a crime involving moral turpitude."

La Commission est en accord complet avec les motifs invoqués pas l'honorable Juge Rose et accepte sur ce point l'appel de Dritsopoulos. Dans le deuxième motif d'expulsion il est reproché à l'appelant d'être dans la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act since he is not in possession of a valid and subsisting immigrant visa as required by subsection 1 of section 28 of the Immigration Regulations, Part 1.

"28(1) Every immigrant who seeks to land in Canada shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by the officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada."

On this point, the Board has held in the past that when the person concerned is an applicant in Canada, the visa requirement could be put aside when the applicant is otherwise admissible. In these circumstances the Board also holds that this ground is wrongly put forward in the deportation order.

Having concluded that the two grounds for deportation are void and contrary to the Immigration Act, the Board decides to allow the appeal under section 14 of the Immigration Appeal Board Act.

Ottawa, March 24, 1970

Concurred in by: Jean-Pierre Houle, and F. Glogowski.

For the appellant: Me Harry Blank, advocate; For the respondent: Jacques Pépin, Esq.

Loi de l'Immigration, parce qu'il n'est pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe l de l'article 28 de la première partie des Règlements de l'Immitration.

"28.(1) Tout immigrant qui cherche à être reçu au Canada devra être en possession d'un visa d'immigrant valable et non périmé qui lui aura été délibré par un préposé aux visas et portant un numéro de série qui a été inscrit par le préposé aux visas dans un registre prescrit par le Ministre à cette fin, et, à moins qu'il ne soit en possession d'un tel visa, on ne lui accordera pas la réception au Canada."

Sur ce point, lorsqu'il s'agit d'un applicant au Canada, la Commission à déjà décidé que l'obligation d'avoir un visa pouvait être écartée lorsque la demande d'admission était autrement recevable. Dans les circonstances la Commission décide que ce motif est aussi invoqué à tort dans l'ordonnance d'expulsion.

Ayant conclu que les deux motifs d'expulsion sont de nul effet et non conformes à la Loi de l'Immigration, la Commission décide d'admettre l'appel sous l'article 14 de la Loi de la Commission d'appel de l'Immigration.

Ottawa, le 24 mars 1970.

Ont souscrit: Jean-Pierre Houle et F. Glogowski.

Pour l'appelant: Me Harry Blank; Pour l'intimé: M. Jacques Pépin. 31. Tsang Wong LAU,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 12, 1970; File: 69-939.

Coram: Jean-Pierre Houle, Vice-Chairman, Gérard Legaré, F. Glogowski.

Section 15 I.A.B. Act - nature of Board's jurisdiction - Immigration Appeal Board Act: 15.

Held: The appeal is dismissed on law.

As to the Board's jurisdiction under Section 15, it is one of equity, and equity follows the law. Equitable remedies are discretionary but this could only mean that such remedies will be applied in each and every case in the light of its own circumstances and if and when it has been proven to the satisfaction of the Court vested with equitable jurisdiction that, in a given case, equitable remedies or special relief are warranted. This must be proven judicially, that is, that the individual seeking equity shall establish, by legally authorized means, the correctness of the facts which act as the basis for his alleged right. Mere sympathy or the mere balance of convenience can hardly be considered as foundation for the exercise by a Court of law, of its equitable jurisdiction.

The judgment of the Board was delivered by:

Jean-Pierre Houle, Vice-chairman:

Appeal from an Order of deportation made at Montréal on May 22, 1969, against Tsang Won LAU, the appellant.

The Order of deportation reads as follows:

- "1) you are not a Canadian citizen;
  - 2) you are not a person having Canadian domicile;
  - 3) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you did remain in Canada by misleading information given by yourself;
  - 4) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the

31. Tsang Wong LAU,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 12 mars, 1970; Dossier: 69-939.

Coram: Jean-Pierre Houle, vice-président, Gérard Legaré, F. Glogowski.

Article 15 de la Loi sur C.A.I. - nature de la juridiction de la Commission - Loi sur la Commission d'appel de l'immigration: 15.

Arrêt: L'appel est rejeté sur une question de droit.

La juridiction accordée à la Commission par l'article 15 est une juridiction d'équité et l'équité suit la loi. Les recours à l'équité sont discrétionnaires, mais ceci signifie simplement que de tels recours seront appliqués dans chaque cause compte tenu des circonstances et lorsque la preuve aura convaincu la cour, dotée d'une juridiction d'équité, que dans cette cause le recours à l'équité ou un redressement spécial sont justifiés. Ceci doit être prouvé judiciairement, c'est-à-dire que l'individu qui cherche à bénéficier de l'équité doit démontrer, à l'aide des moyens autorisés par la loi, de l'exactitude du fait qui veut fonder la prétention à ce droit. Une vague sympathie ou un vague équilibre des inconvénients peuvent à peine être considérés pour fonder l'exercice de la juridiction d'équité de cette Cour.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle, vice-président:

Appel d'une ordonnance d'expulsion rendue à Montréal le 22 mai 1969 contre Tsang Won LAU, l'appelant.

L'ordonnance dit:

- "1) you are not a Canadian citizen;
  - 2) you are not a person having Canadian domicile;
  - 3) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you did remain in Canada by misleading information given by yourself;

Immigration Act in that you did come into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;

5) in accordance with subsection (2) of section 19 of the Immigration Act, you are subject to deportation."

Appeal has been heard at Montreal on February 25, 1970, the appellant being present and represented by counsel, Me James Feng, advocate. Mr. J. Pépin of the Department of Manpower and Immigration was acting for the respondent.

The validity and the legality of the Order of deportation are not contested and the Court is satisfied that the order is valid and made in accordance with the law. Therefore the appeal should be dismissed and is hereby dismissed in accordance with Section 14 of the Immigration Appeal Board Act.

In his submissions learned counsel for the appellant has said: (at page 18 of the transcript of evidence and submissions) -  $\,$ 

"If he is deported, it would amount to nothing, but confiscation of all what he made here in Canada. That would be almost the end of the world for him. I do believe he deserves the very special consideration of the Board, and I pray on his behalf that the Board exercise the jurisdiction given to you by law to give him humanitarian consideration and let him remain in Canada. He will not only be a good citizen, but - like most of the Chinese Canadians - but has already created employment for Canadians in Canada. It would be disastrous for him if he has to loose everything. As you know, life is so hard in Hong Kong. A small Island of more than four million of population. If he doesn't deserve a very special consideration under humanitarian grounds, I don't know who else deserves such consideration.

On behalf of my client, I will plead again that you allow him to stay in Canada."

The question to be answered is: Does this case come within the purview of Section 15 of the Immigration Appeal Board Act?

In creating the Immigration Appeal Board, Parliament has seen it fit to make the Board a Court of record having in all matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a Superior Court of record. (Section 7 of the Immigration Appeal Board Act). Therefore

- 4) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you did come into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;
- 5) in accordance with subsection (2) of section 19 of the Immigration Act, you are subject to deportation."

L'appel a été entendu à Montréal le 25 février 1970; l'appelant était présent et par ministère d'avocat Me James Feng. M. J. Pépin du ministère de la Main-d'oeuvre et de l'Immigration occupait pour l'intimé.

L'appelant ne conteste ni la validité ni la légalité de l'ordonnance d'expulsion; et la Cour est persuadée que l'ordonnance d'expulsion est valide et a été faite conformément aux prescription de la loi. En conséquence, l'appel doit être rejeté et est par la présente rejeté en vertu de l'article 14 de la Loi sur la Commission d'appel de l'Immigration.

Dans sa plaidoirie le savant conseiller de l'appelant a déclaré (page 18 de la transcription de la preuve et de la plaidoirie):

"If he is deported, it would amount to nothing, but confiscation of all what he made here in Canada. That would be almost the end of the world for him. I do believe he deserves the very special consideration of the Board, and I pray on his behalf that the Board exercise the jurisdiction given to you by law to give him humanitarian consideration and let him remain in Canada. He will not only be a good citizen, but - like most of the Chinese Canadians - but has already created employment for Canadians in Canada. It would be disastrous for him if he has to lose everything. As you know, life is so hard in Hong Kong. A small Island of more than four million of population. If he doesn't deserve a very special consideration under humanitarian grounds, I don't know who else deserves such consideration.

On behalf of my client, I will plead again that you allow him to stay in Canada."

La question à laquelle nous devrons répondre est la suivante: Est-ce que cette cause est du ressort de l'article 15 de la Loi sur la Commission d'appel de l'immigration?

En créant la Commission d'appel de l'immigration, le Parlement a jugé approprié de faire de la Commission une cour d'archives qui a en ce qui concerne toutes les questions nécessaires ou appropriées à the powers vested in the Court under Section 15 are powers to be exercised judicially; the jurisdiction attributed to the Court under the aforesaid section is one in equity and equity follows the law. Surely, equitable remedies are discretionary but this could only mean that such remedies will be applied in each and every case in the light of its own circumstances, and if and when it has been proven to the satisfaction of the Court vested with equitable jurisdiction that in a given case equitable remedies or special relief are warranted. This has to be proven judicially, that is, that the individual who is seeking equity shall establish, by legally authorized means, the correctness of the facts which act as the basis for his alleged right. Mere sympathy or the mere balance of convenience can hardly be considered as foundation to the exercise by a Court of law of its equitable jurisdiction. Days are long passed since equity was as long as the Chancellor's foot.

In the recent history of this Court and in too many cases there has been an abusive of the coined phrase "discretionary powers" as if the law, as expressed in Section 15 of the Immigration Appeal Board Act, was not providing for some objective criteria for the exercise by the Court, of its equitable jurisdiction.

### Section 15 recites:

- "(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
  - (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or
  - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
    - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
    - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

l'exercice régulier de sa compétence, tous les pouvoirs droits et privilèges d'une cour supérieure d'archives (article 7 de la Loi sur la Commission d'appel de l'immigration). En conséquence, en vertu de l'article 15 la Cour a des pouvoirs qui doivent être exercés judiciairement; cet article attribue à cette Cour une juridiction d'équité et l'équité suit la loi. Sans aucun doute des recours à l'équité sont discrétionnaires, mais ceci signifie simplement que de tels recours seront appliqués dans chaque cause compte tenu des circonstances et lorsque la preuve aura convaincu la cour, dotée d'une juridiction d'équité, que dans cette cause le recours à l'équité ou un redressement spécial sont justifiés. Ceci doit être prouvé judiciairement, c'està-dire que l'individu qui cherche à bénéficier de l'équité doit démontrer à l'aide des moyens autorisés par la loi, de l'exactitude de fait qui veut fonder la prétention à ce droit. Une vague sympathie ou un vague équilibre des inconvénients peuvent à peine être considérés pour fonder l'exercice de la juridiction d'équité de cette Cour. Il y a bien longtemps que l'équité n'est plus arbitraire (days are long passed since equity was as long as the Chancellor's foot.)

Au cours de la récente histoire de cette Cour il y a eu trop de causes ou l'expression consacrée "pouvoirs discrétionnaires" a été employée abusivement comme si la loi, telle qu'exprimée dans l'article 15 de la Loi sur la Commission d'appel à l'immigration, n'avait pas prévu quelque critère objectif visant l'exercice de la juridiction d'équité de cette Cour.

#### L'article 15 dit:

- "(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
  - (a) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas, ou
  - (b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
    - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
    - (ii) l'exsitence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

The case of a person who was a permanent resident at the time of the making of the order of deportation does not usually present too much difficulty, provided, of course, that all the relevant circumstances have been established.

In the case of a person who was not a permanent resident at the time of the making of the order of deportation, such a person has to prove to the satisfaction of the Court:

- the existence of reasonable grounds (this is objective) for believing that if execution of the order is carried out the person will be (not may be)punished for activities of a political character; activities of a political character are things which can be appreciated objectively;
- 2°: the existence of reasonable grounds for believing that if the order is carried out the person will suffer unusual hardship; the Oxford English Dictionary defines unusual: 'Not often occurring or observed, different from what is usual; out of the common, remarkable, exceptional"; even though relative, the unusuality of a given situation is opened to an objective appreciation;

or

the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief; surely "compassionate or humanitarian considerations" is a phrase expressing a rather vague concept and compassion and humanitarian are hardly opened to satisfactory legal definitions but they are not tantamount to mean sentimentalism or emotionalism and, in any event, the compassionate and the humanitarian considerations have to be of such a nature or of such a magnitude that they warrant, that is to say that they justify the granting of special relief, and this is also opened to quite a degree of objectivity.

The expression "in the opinion of" as contained in subparagraph (ii) of paragraph (b) of subsection (l) of Section 15 of the Immigration Appeal Board Act, is commonly used in statutes and regulations for the purpose of conferring a discretion on a Minister, deputy minister, judge or other person or body. But the discretion or the power given to the Board is not an arbitrary one to be exercised according to its fancy. To quote the language of Lord Halsbury in Sharp v. Wakefield, the Court must act "according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be nor arbitrary, vague and fanciful, but legal and regular."

In the present instance, the appellant was not a permanent resident at the time of the making of the order of deportation and he does not allege the existence of reasonable grounds for believing that if execution of the order is carried out he will be punished for

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

Dans le cas d'une personne qui était un résident permanent à l'époque de la présentation de la demande l'affaire ne présente pas trop de difficultés, en autant bien sûr que toutes les circonstances pertinentes ont été établies.

Dans le cas d'une personne qui n'était pas un résident permanent au moment de la présentation de la demande, une telle personne doit prouver afin de convaincre la Cour:

- 1: de l'existence de motifs raisonnables (ce qui est objectif)
  de croire que si l'on procède à l'exécution de l'ordonnance
  la personne sera (non pas pourrait être) punie pour des
  activités d'un caractère politique; lesquelles activités
  peuvent être appréciées d'une façon objective;
- 2: de l'existence de motifs raisonnables de croire que si l'on procède à l'exécution de l'ordonnance la personne sera soumise à de graves tribulations (unusual hardship); the Oxford English Dictionary définit "unusual" ainsi: "Not often, occuring or observed different from what is usual; out of common, remarkable, exceptional"; bien que relatif, ce qui est exceptionnel dans une situation donnée s'apprécie d'une façon objective;

ou

3: de l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui de l'avis de la Commission, justifient l'octroi d'un redressement spécial; il est sûr que "motifs de pitié ou de considérations d'ordre humanitaire" sont des mots qui expriment un concept plutôt vague et ceux-ci débouchent difficilement sur une définition légale satisfaisante. La signification des mots "motifs de pitié ou de considérations d'ordre humanitaire" n'équivaut pas à celle de sentimentalisme ou de sensiblerie et, en l'occurence, les motifs de pitié ou de considérations d'ordre humanitaire doivent être de telle nature et de telle force qu'ils justifient l'octroi d'un redressement spécial, cette justification est aussi soumise à un certain degré d'objectivité.

L'expression "de l'avis de" telle que contenue dans le sousalinéa (ii) de l'alinéa (b) du paragraphe (1) de l'article 15 de la Loi sur la Commission d'appel de l'immigration est communément employée dans les statuts et les règlements dans le but de conférer un pouvoir discrétionnaire au Ministre, sous-ministre, juge ou tout autre personne acitivities of a political character. But the appellant does allege that if deported, he will suffer unusual hardship. Did the appellant proved the existence of reasonable grounds for believing that it will be so?

The appellant arrived in Canada on September 13, 1966, at Montréal; he was employed as a crew member on board the "Overseas Pioneer". Approximately two days after his ship's arrival, he jumped his ship and remained ashore without the approval of an Immigration Officer after the departure of the ship for Aruba and went to work almost immediately. In order to remain undetected, the appellant changed his name and even obtained a Social Security Card under his false name. The appellant came to the attention of the Immigration authorities only in 1969 and only because he was arrested for illegal entry and sentenced as charged. The appellant has knowingly and willingly committed fraud by illegal entry into Canada, by using false name, by constantly eluding the immigration authorities. It is a very well known maxim that "he who comes into equity must come with clean hands."

Sometime in 1968, the appellant came into the restaurant business with four partners, making a personal investment of six thousand and six hundred dollars and he is still in that business. Now the appellant comes to the Court and says I have worked very hard to save money and become self-employed, I have shown initiative since during a very short spell I have successfully established myself in Canada and if you order that the deportation order be executed, I may lose what I have gained, and please forget and forgive that my gains have been made while I was illegally in Canada; the statute which created this Court gives you that power. There is a very simple answer to that and it is that equity will not permit a statute to be a cloak for fraud.

The money that the appellant has made, and is making, will not be confiscated and even if he has to sell his share of the business at a loss, this does not constitute an unusual hardship, it is indeed a casual risk in any commercial venture.

The appellant is not deeply rooted in Canada. His wife, his child, his parents, who are all dependent upon him, are in Mainland China, and he should return to them or at his volition, try to bring them to Hong-Kong of where he was a resident.

On the basis of the evidence adduced and according to the rules of reason and justice, the Court declines to exercise its equitable jurisdiction and directs that the order of deportation be executed as soon as practicable pursuant Section 15(1) of the Immigration Appeal Board Act.

At Montréal, this 21st day of April 1970.

Concurred in by: Gérard Legaré and F. Glogowski.

For the appellant: Me James Feng;

For the respondent: M. Jacques Pépin, Esq.

ou organisme. Mais la discrétion, ou le pouvoir accordé à la Commission n'est pas arbitraire c.à.d. exercé selon son bon vouloir. Lord Halsbury dans l'affaire Sharp c. Wakefield déclare, la cour doit agir "according to the rules of reason and justice, not according to private opinion, according to law not to humour. It is to be not arbitrary, vague and fanciful, but legal and regular."

Dans cette instance, l'appelant n'était pas un résident permanent à l'époque où a été rendue de l'ordonnance d'expulsion et il n'a pas avancer l'existence de motifs raisonnables de croire que si l'on procède à l'xécution de l'ordonnance d'expulsion il sera puni pour des activités d'un caractère politique. Mais il a prétendu que s'il est expulsé il sera soumis à de graves tribulations. Est-ce que l'appelant a prouvé l'exitence de motifs raisonnables de croire qu'il en sera ainsi?

L'appelant est arrivé à Montréal le 13 septembre 1966; Il était membre d'équipage du navire "Overseas Pioneer". Environ deux jours après l'arrivée du navire, il le quitta; et sans l'autorisation d'un fonctionnaire à l'immigration il est resté à terre après le départ du navire pour Aruba; il a travaillé presque immédiatement. Afin de ne pas être découvert l'appelant a changé de nom et sous un faux nom il a même obtenu une carte de sécurité sociale. L'appelant n'a eu à faire aux autorités de l'immigration qu'en 1969; il a été arrêté seulement pour entrée illégale et a été condamné sous ce chef d'accusation. L'appelant a délibérement frauder en entrant illégalement au Canada sous un faux nom et en se dérobant constamment devant les autoriés de l'immigration. La maxime bien connue dit: "he who comes into equity must come with clean hands."

En 1968 l'appelant et quatre associés ont établi um restaurant; il y a investi six mille six cent dollars et dirige encore cette affaire. À présent l'appelant vient devant la Cour et déclare qu'il a fort travaillé afin d'épargner de l'argent et de s'établir à son compte, qu'il a fait preuve d'initiative puisqu'en effet il a pris peut de temps à s'établir à son compte au Canada et que si l'ordonnance d'expulsion était exécutée il perdrait ce qu'il a acquis; et enfin puisque le statut qui la crée lui en donne le pouvoir, la Cour oublie et lui pardonne le fait qu'il a amassé des profits alors qu'il était au Canada d'une façon illégale.

L'argent que l'appelant a gagné et celui qu'il gagne a présent ne sera pas confisqué et même s'il doit vendre à perte ses parts de l'affaire, ceci ne peut être considéré comme de graves tribulations, puisque c'est le risque normal attaché à toute affaire commerciale.

L'appelant n'a pas noué de liens très forts au Canada. En Chine continentale, sa femme, son enfant, ses parents sont à sa charge et il devrait retourner auprès d'eux,ou, à son gré, tenter de les emmener à Hong-Kong où il était résident. D'après la preuve produite et selon les règles de la raison et de la justice la Cour se refuse à exercer sa juridiction d'équité et ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible, conformément à l'article 15(1) de la Loi sur la Commission d'appel à l'immigration.

Fait à Montréal le 21 avril 1970.

Ont souscrit: Gérard Legaré et F. Glogowski.

Pour l'appelant: Me James Feng; Pour l'intimé: M. Jacques Pépin. 32. Luong Chau PHUOC,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: May 8, 1970; File: 69-937.

Coram: Jean-Pierre Houle, Vice-Chairman, Gérard Legaré, F. Glogowski.

Jurisdiction of the Board - nature of - Section 15 of the Immigration Appeal Board Act - Political activities - Immigration Appeal Board Act: 7(1) and (2), 15, 22.

Held: The Board dismisses the appeal on law.

Turning to the jurisdiction in equity conferred upon the Board by section 15 of the Immigration Appeal Board Act, jurisdiction in equity necessarily involves discretion but equity follows the law and does not precede it; it gives substance to the letter of the law but cannot replace it. Finally, discretion is not emotion nor a passing mood, nor the vague expression of a still more indefinite humanitarism; evidence must be judicially adduced as to the existence (which is an objective fact) of reasonable grounds (feeling is not reasoning) which would warrant the granting of special relief in each particular case.

The judgment of the Board was delivered by:

Jean-Pierre Houle, Vice-Chairman:

This is an appeal from an order of deportation made in Montreal, Quebec, May 6, 1969 against the appellant, Luong Chau PHUOC.

The deportation order reads as follows:

- "1) vous n'êtes pas un citoyen canadien;
  - vous n'êtes pas une personne ayant acquis le domicile canadien;
  - 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa 5(t) de la Loi sur l'Immigration en ce que
    - a) l'alinéa (b) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration en ce que un visa d'immigrant ne vous aurait pas été délivré hors du Canada si vous aviez subi un examen hors du Canada à titre de requérant indépendant parce que vous ne possédez pas les

32.

Luong Chau PHUOC,

appelant,

V .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 8 mai 1970; Dossier: 69-937.

Coram: Jean-Pierre Houle, vice-président, Gérard Legaré, F. Glogowski.

Juridiction de la Commission - nature. - Article 15 de la Loi de la Commission d'appel de l'immigration - Activités politiques. - Loi de la Commission d'appel de l'immigration: 7(1) et (2), 15, 22.

Arrêt: La Cour rejette l'appel en droit.

En ce qui concerne la juridiction d'équité de la Cour reconnue à l'article 15 de sa loi organique, qui dit juridiction d'équité dit juridiction discrétionnaire, mais l'équité suit la loi, elle ne la précède pas; elle substantifie la lettre de la loi, elle ne saurait se substituer à celle-ci. Enfin, discrétion n'est pas émotion, humeur du moment, expression vague d'un humanitarisme plus vague encore; la preuve doit être administrée judiciairement de l'existence (qui est un fait objectif) de motifs raisonnables (sentiment n'est pas raison) justifiant un redressement spécial dans un cas particulier.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle, vice-président:

Appel d'une ordonnance rendue à Montréal, Québec, le 6 mai 1969, contre Luong Chau PHUOC, l'appelant.

L'ordonnance d'expulsion dit:

"1) vous n'êtes pas un citoyen canadien;

2) vous n'êtes pas une personne ayant acquis le domicile canadien:

3) vous êtes un membre de la catégorie interdite décrite à l'alinéa 5(t) de la Loi sur l'Immigration en ce que

a) l'alinéa (b) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration en ce que un visa d'immigrant ne vous aurait pas été délivré hors du Canada si vous aviez subi un examen hors du Canada à titre de requérant indépendant parce que vous ne possédez pas les moyens de subvenir à vos besoins d'établissement contrairement au paragraphe (1) de l'article 32 de la première partie des Règlements et de la Loi sur l'Immigration;

moyens de subvenir à vos besoins d'établissement contrairement au paragraphe (1) de l'article 32 de la première partie des Règlements et de la Loi sur l'Immigration;

- b) vous n'avez pas fait une demande en la forme prescrite par le Ministre avant l'expiration de la période pendant laquelle vous avez été autorisé à séjourner temporairement au Canada par un fonctionnaire à l'Immigration tel que requis à l'alinéa (d) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- c) vous avez pris un emploi au Canada sans le consentement écrit d'un agent du Ministère contrairement à l'alinéa (3) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- d) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration."

The hearing of this appeal was held on February 17, 20 and 27, 1970. The appellant was present and represented by counsel Me B.S. Mergler and Me S. Bless. The respondent, was represented by Mr. J. Pépin from the Department of Manpower and Immigration.

Luong Chau Phuoc is a citizen of Vietnam, age 25 and single; he came into Canada on September 1, 1964; he held a scholarship under the Colombo Plan and was admitted as a student under section 7(1)(f) of the Immigration Act; his status was renewed three times and expired definitely on August 24, 1968. The appellant has studied at Laval University in Québec City where he was granted a bachelor's degree in biochemistry. Almost four months after his status as a non-immigrant student had expired, on December 27, 1968, Phuoc reported to the immigration authorities in Montréal and applied for permanent residence; meanwhile, Phuoc had worked in a hospital as a laboratory technician and had done some office work at the University of Montréal, for which he had received a salary on which he had saved some \$200 when he applied for permanent residence. His application was turned down by the examining officer and upon receipt of a section 23 report, a special inquiry was held which resulted in the Special Inquiry Officer making the above quoted deportation order.

Such are the facts relevant to the deportation order appealed from before this Board under the Immigration Appeal Board Act.

- b) vous n'avez pas fait une demande en la forme prescrite par le Ministre avant l'expiration de la période pendant laquelle vous avez été autorisé à séjourner temporairement au Canada par un fonctionnaire à l'Immigration tel que requis à l'alinéa (d) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- c) vous avez pris un emploi au Canada sans le consentement écrit d'un agent du Ministère contrairement à l'alinéa (e) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- d) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration."

L'audition de cet appel a eu lieu les 17, 20 et 27 février 1970, l'appelant étant présent et par ministère d'avocats, Me B.S. Mergler et Me S. Bless. M. J. Pépin du Ministère de la Main-d'oeuvre et de l'Immigration occupait pour l'intimé.

Luong Chau Phuoc est un citoyen du Vietnam, célibataire et âgé de 25 ans; il est arrivé au Canada le ler septembre 1964; boursier du Plan Colombo, il fut admis à titre d'étudiant conformément à l'article 7 (1) (f) de la Loi de l'immigration; son statut fut renouvelé à trois reprises et prit fin définitivement le 24 août 1968. L'appelant a étudié à l'Université Laval, de Québec, et a obtenu un baccalauréat en biochimie. Près de quatre mois, soit le 27 décembre 1968, après que son statut de non-immigrant, étudiant, fut périmé, Phuoc se présenta aux autorités de l'immigration à Montréal et y soumit une demande de résidence permanente; entre-temps Phuoc a travaillé dans un hôpital comme technicien de laboratoire et a exécuté quelques travaux de cléricature à l'Université de Montréal, le tout contre rémunération en argent dont il lui restait environ \$200. au moment de loger sa demande de résidence permanente. Cette demande fut rejetée par le fonctionnaire-examinateur et au reçu d'un rapport fait conformément à l'article 23 de la Loi de l'immigration, une enquête spéciale a été tenue au terme de laquelle l'enquêteteur spécial à rendu l'ordonnance d'expulsion dont nous avons connu plus haut.

Tels sont les faits pertinents à l'ordonnance d'expulsion, dont appel à cette Cour en vertu de la Loi de la Commission d'appel de l'immigration.

L'appelant n'invoque pas son premier moyen d'appel, c'està-dire qu'il ne conteste pas la validité ni la légalité de l'ordonnance The appellant does not put forward his first ground of appeal, that is to say he does not contest the validity nor the legality of the deportation order. The Board is satisfied that the special inquiry resulting in the making of the deportation order, was conducted in accordance with the provisions of the Immigration Act and the Immigration Inquiries Regulations and the Board holds further that the said deportation order is well founded in fact and on law and that the appeal must be dismissed.

The Board therefore dismisses the appeal on law under section 14(b) of the Immigration Appeal Board Act.

The second ground of appeal is the recourse to the jurisdiction in equity conferred upon this Board by section 15 of the Immigration Appeal Board Act:

"Section 15(1) When the Board dismisses an appeal against an order of deportation ... it shall direct that the order be executed as soon as practicable, except that

- b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
  - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character of will suffer unusual hardship,... the Board may direct that the execution of the order of deportation be stayed, or may quash the order of quash the order and direct the grant of entry or landing to the person against whom the order was made.

As said previously, the Board has dismissed Phuoc's appeal under section 14(b) of the Immigration Appeal Board Act, the deportation order as such being valid and well founded in law.

The appellant, by his second ground of appeal, now resorts to the Board's jurisdiction in equity and in so doing alleges that if the deportation order is carried out, he will be punished for activities of a political character or will suffer unusual hardship.

Before examining the evidence supporting this allegation, it is necessary to specify the legislator's intent as to the range and the limits of the powers and jurisdiction given to the Board.

The legislator, the Parliament of Canada, in creating the Immigration Appeal Board (14-15-16 Elisabeth II, ch. 90) has made it a Court of record having in all matters necessary or proper for the

d'expulsion. La Cour est satisfaite que l'enquête spéciale, conclue par l'émission d'une ordonnance d'expulsion, a été conduite conformément aux prescriptions de la Loi de l'immigration et du règlement sur les enquêtes de l'immigration et, de plus, la Cour juge que ladite ordonnance d'expulsion est fondée en fait et en droit et que l'appel doit être rejeté.

Selon l'article 14 (b) de la Loi de la Commission d'appel de l'immigration, la Cour rejette l'appel, en droit.

Le second moyen d'appel est le recours à la juridiction d'équité que la Loi reconnait à cette Cour en l'article 15 de la Loi de la Commission d'appel de l'immigration:

"Article 15(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion... elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que

- b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
  - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations... la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

Ainsi que l'on a pu le lire plus haut, la Cour a rejeté, conformément à l'article 14 b) de la Loi de la Commission d'appel de l'immigration, l'appel de Phuoc, l'ordonnance d'expulsion telle que rendue étant valide et fondée en droit.

L'appelant, par son second moyen d'appel, invoque maintenant la juridiction d'équité conférée à cette Cour et il allègue pour ce faire que si l'on procède à l'exécution de l'ordonnance, il sera puni pour des activités d'un caractère politique ou soumis à de graves tribulations.

Avant d'examiner la preuve au soutien de cette allégation, il est nécessaire de préciser l'étendue et les limites de la compétence et de la juridiction de la Commission telles que les a voulues le législateur.

Le législateur, le Parlement du Canada, en créant la Commission d'appel de l'immigration (14-15-16 Elizabeth II, ch. 90) en a fait une Cour d'archives qui a dans toutes questions nécessaires due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record, (section 7 (1)(2); the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation (section 22). Finally, section 11 holds that: "a person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact."

The Board is therefore a Court and as such it is totally independent; as a Court, its jurisdiction is essentially appellate and, as all tribunals, whether regular or "d'exception", it has been established in order that individual rights be respected and it must see to it that justice is done in each particular case, in the light of the particular circumstances of each case. As mentioned above, when it dismisses an appeal, the Board can exercise a jurisdiction in equity conferred upon it by section 15, but here again this jurisdiction must be exercised judicially, that is the Court hears an appeal and decides on it after having hear judicial evidence defined as follows: "La démonstration, à l'aide des moyens autorisés par la loi, de l'exactitude d'un fait qui sert de fondement à un droit prétendu." (Beaudry - Lacantinerie et Barde, Traité théorique et pratique de droit civil, 3rd edition, quoted in Trudel, Traité de droit civil du Québec, Vol. 9). In this regard it will be useful to note that in the Board's brief history, (the first case having been heard in 1967 and nearly two thousand five hundred other cases having been heard since), the words "discretionary powers of the Board" have too often been wrongly interpreted and improperly used. Surely, jurisdiction in equity involves discretion, but equity follows the law and does not precede it; it gives substance to the letter of the law but cannot replace it. Finally, discretion is not emotion nor a passing mood, nor the vague expression of a still more indefinite humanitarianism; evidence must be judicially adduced as to the existence (which is an objective fact) of reasonable grounds (feeling is not reasoning) which would warrant the granting of special relief in a particular case.

Has the appellant adduced the evidence, of which he has the onus, in support of his allegation? Has he <u>proved</u> the <u>existence</u> of <u>reasonable grounds for believing</u> that if the deportation order is carried out he, the appellant, will be punished for activities of a political character or will suffer unusual hardship? Such is the question, and the only question, that must be answered.

War as such is horrible and it is even more so when it sets against each other brothers of the same blood; any citizen who then seeks to come between the two rival factions, or who simply advocates peace, becomes equally suspect to both factions and it is not

ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une Cour supérieure d'archives, article 7 (1)(2); la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion (art. 22). Enfin l'article ll dit: "qu'une personne contre qui a été rendue une ordonnance d'expulsion, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission."

Donc la Commission est une Cour et comme telle jouit d'une totale indépendance; c'est une Cour qui a essentiellement une juridiction d'appel et, comme tous les tribunaux, qu'ils soient réguliers ou d'exception, elle a été établie dans le but de faire respecter les droits individuels et il lui revient de faire triompher la justice dans chaque cas particulier, à la lumière des circonstances propres à chaque cas particulier. Ainsi qu'il a été dit plus haut, lorsqu'elle rejette un appel, la Commission peut exercer une juridiction d'équité qui lui est attribuée par l'article 15 mais ici encore cette juridiction doit s'exercer judiciairement, c'est-à-dire que la Cour connait d'un appel et en dispose après avoir entendu la preuve judiciaire qui se définit ainsi: "La démonstration, à l'aide des moyens autorisés par la loi, de l'exactitude d'un fait qui sert de fondement à un droit prétendu." (Baudry-Lacantinerie et Barde, Traité théorique et pratique de droit civil, 3e édition, cité au Traité de droit civil du Québec de Trudel, Tome 9<sup>e</sup>). A cet égard il est utile de faire observer qu'au cours de la courte histoire de la Commission (la première affaire a été entendue en novembre 1967 et près de deux mille cinq cents autres l'ont été depuis), il y a eu trop souvent fausse interprétation du concept et usage abusif de l'expression "les pouvoirs discrétionnaires" de la Commission. Certes, qui dit juridiction d'équité dit juridiction discrétionnaire, mais l'équité suit la loi, elle ne la précède pas, elle substantifie la lettre de la loi, elle ne saurait se substituer à celle-ci. Enfin, discrétion n'est pas émotion, humeur du moment, expression vague d'un humanitarisme plus vague encore; la preuve doit être administrée judiciairement de l'existence (qui est un fait objectif) de motifs raisonnables (sentiment n'est pas raison) justifiant un redressement spécial dans un cas particulier.

L'affaire Phuoc pose le problème dans ses données vraies.

L'appelant a-t-il fait la preuve - et le fardeau pèse sur lui - au soutien de son allégation? A-t-il <u>démontré l'existence</u> de motifs raisonnables de croire que si l'on procède à l'exécution de l'ordonnance d'expulsion, lui, l'appelant, sera puni pour des activités d'un caractère politique ou soumis à de graves tribulations? Telle est la question, et la seule, à laquelle nous devons répondre.

unreasonable to believe that they will find no rest until they have neutralized or gotten rid of him. History abounds with such examples that such a war, with its pervasive decay is being fought in Vietnam is a fact so well known that it permeates the daily lives of each one of us. But what must hold our attention here is the evidence pertaining to the attitude and the stand the appellant has taken in the conflict that is tearing his country. If this evidence revealed that the appellant, by his actions, his statements or his writings has challenged his government's position, it would have to be concluded that his challenge, in the particular circumstances of the Vietnamese conflict, is clearly of a political nature and it would be reasonable to believe that for such activity the appellant would be punished and be submitted to unusual hardship if the deportation order were carried out.

Counsel for the appellant has called nine witnesses, and the appellant himself and he has also filed abundant documentary evidence. Not all of the testimony and evidence is relevant, either because it reflects personal or general opinions or because it is hearsay.

The testimony of two of the witnesses, professors Jacques Rousseau and Robert Garry, must especially be considered. Both witnesses know the appellant personally and are familiar with his academic and extra-curricular activity. What is made especially clear by this testimony is that Phuoc has been and still is what is known as an activist among the hundred of Vietnamese students attending Canadian universities and that his opposition to the war is well known. We have no position to take as to this participation but we must keep in mind that it gives to the conflict between Vietnamese a very special dimension and that for one of them to oppose it publicity makes him all the more suspect to the eyes of his government.

I wish to insist on the testimony given by professor Garry who is a well known expert on asiatic questions and especially on Vietnamese affairs, having been for fifteen years an administrator in the civil service of Indochina for the French government. Professor Garry does not hesitate to state that "en mon âme et conscience, je crois que renvoyer ce jeune homme et d'autres, peutêtre, qui se trouvent dans sa situation, au Vietnam, serait les condamner à la privation de la liberté, si ce n'est pas privation de la vie."

This testimony must be accepted.

Evidence shows that the appellant has been editor-in-chief of a review published in the vietnamese language and that he is still on the editorial staff of this review which, although it does not clearly claim to be a political review nevertheless speaks freely of

Toute guerre est une horreur en soi et elle est plus horrible encore lorsque les ennemis qui s'affrontent sont des frères de sang; tout citoyen qui veut alors s'interposer ou qui tous simplement préconise la paix devient également suspect aux factions rivales qui n'auront de cesse - il n'est pas irraisonnable de le présumer qu'elles ne l'aient neutralisé ou qu'elles ne s'en soient débarrassées. L'Histoire témoigne hautement de ce fait. Qu'il y ait une telle guerre au Vietnam - et qui pourrit tout - c'est aussi hélas, un fait, un fait si connu qu'il habite le quotidien de chacun d'entre nous. Mais ce qui doit ici nous retenir c'est la preuve pertinente à l'attitude, à la prise de position de l'appelant dans le conflit qui déchire son pays. Si la preuve révélait que l'appelant par des gestes, des déclarations, des écrits s'est dressé comme un contestataire des actions du gouvernement dont il est ressortissant, il faudrait conclure que sa contestation, dans les circonstances particulières au conflit vietnamien, revêt nettement le caractère d'activité politique et il serait raisonnable de croire que pour cette activité l'appelant serait puni ou soumis à de graves tribulations si l'on procédait à l'exécution de l'ordonnance d'expulsion.

Le procureur de l'appelant a cité à la barre, neuf témoins, l'appelant lui-même, et a produit une abondante preuve documentaire. Tout n'est pas à retenir de ces témoignages ni de cette preuve, soit qu'ils ne reflètent que des vues générales ou personnelles, soit qu'ils ne soient que du ouf-dire.

Deux témoignages plus particulièrement, sont à retenir, ceux des professeurs Jacques Rousseau et Robert Garry, tous les deux connaissent personnellement l'appelant et sont au fait de son activité académique et extra-académique. Il ressort principalement de ces deux témoignages que Phuoc a été et est ce que l'on appelle un activiste parmi les centaines d'étudiants vietnamiens qui fréquentent les universités canadiennes et que sa position est connue comme en étant une d'opposition à la guerre, à ceux qui la font, et, plus particulièrement, à la participation des Etats-Unis à cette guerre. Nous n'avons pas à nous prononcer sur cette participation mais il nous faut retenir qu'elle donne une dimension toute spéciale au conflit entre Vietnamiens et que le fait pour l'un d'eux de s'y opposer publiquement, le rend plus que suspect aux yeux de son gouvernement.

Je veux insister sur le témoignage du professeur Garry qui est notoirement reconnu comme un expert des questions asiatiques et extraordinairement des affaires vietnamiennes ayant été pendant quinze ans administrateur du service civil de l'Indochine pour le compte du gouvernement français. Or le professeur Garry n'hésite pas à déclarer "en mon âme et conscience, je crois que renvoyer ce jeune homme et d'autres, peut-être,qui se trouvent dans sa situation, au Vietnam, serait les condamner à la privation de la liberté, si ce n'est pas privation de la vie." Ce témoignage doit être reçu.

the present situation in Vietnam. As editor-in-chief, Phuoc had to take full responsibility for the contents of the review.

Finally, we must quote here the following part of the submissions made to the Board by counsel for the respondent: "Normalement, l'intimé demanderait à la Commission d'ordonner que l'on procède à l'exécution de l'ordonnance. Depuis quelque temps déja la politique du gouvernement canadien, à laquelle l'intimé souscrit, a été de ne pas expulser un individu dans un pays où à son retour il pouvait être sujet à persécution. Le gouvernement canadien a octroyé à la Commission d'appel de l'immigration et ce en vertu de la Section 15 de la Loi de la Commission d'appel, des pouvoirs discrétionnaires qu'ils peuvent utiliser en certaines circonstances, incluant la situation où il existe des motifs raisonnables de croire que si l'on procède à l'exécution de l'ordonnance, la personne concernée pourrait être punie pour des activités d'un caractère politique ou soumise à de graves tribulations, et j'ai décrit brièvement à la Commission l'importance du programme d'aide extérieure du Canada. Les circonstances de la présence de l'appelant au Canada et la politique gouvernementale concernant les individus qui peuvent être sujets à persécution suivant expulsion et l'appelant a déclaré que si l'on procède à l'exécution de l'ordonnance, il serait persécuté et plusieurs personnes ont témoigné dans cette matière. La Commission doit maintenant rendre une décision et l'intimé n'a pas l'intention de quelque manière que ce soit d'influencer la Commission dans sa délibération sur le jugement à rendre. C'est tout, Monsieur le Président."

The Board, in accordance with the Act by which it was created and with the known rules of evidence, has in its deliberations isolated the evidence relevant to section 15(1) of the Immigration Appeal Board Act and the Board is satisfied that the appellant has shown the existence of reasonable grounds for believing that if the deportation order is carried out the appellant will be punished for activities of a political character or will suffer unusual hardship. At the inquiry as well as at the hearing of the appeal, the appellant has stated that he intends to return to his country as soon as circumstances will allow. The Board did not have to issue an opinion on the external aid program as it applies within the framework of Colombo Plan but it does note that the appellant has a contractual obligation to return to his country.

For all these reasons, the Board directs that the execution of the deportation order be stayed sine die and that the appellant report to immigration authorities every six months from this day on.

May 8, 1970.

Concurred by: Gérard Legaré and F. Glogowski.

For the appellant: Mes. B.S. Mergler and S. Bless, Barristers; For the respondent: Jacques Pépin Esq.

Il est en preuve que l'appelant a été le rédacteur-en-chef et est toujours membre de la rédaction, d'une revue publiée surtout en langue vietnamienne et qui sans s'afficher nettement comme revue politique, traite librement de la situation présente au Vietnam. En tant que rédacteur-en-chef, Phuoc devait assumer la responsabilité du contenu de la publication.

Enfin il faut reproduire ici la partie suivante des représentations faites à la Cour par le représentant de l'intimé: 'Normalement, l'intimé demanderait à la Commission d'ordonner que l'on procède à l'exécution de l'ordonnance. Depuis quelque temps déjà la politique du gouvernement canadien, à laquelle l'intimé souscrit, a été de ne pas expulser un individu dans un pays où à son retour il pouvait être sujet à persécution. Le gouvernement canadien a octroyé à la Commission d'appel de l'immigration et ce en vertu de la Section 15 de la Loi de la Commission d'appel, des pouvoirs discrétionnaires qu'ils peuvent utiliser en certaines circonstances, incluant la situation où il existe des motifs raisonnables de croire que si l'on procède à l'exécution de l'ordonnance, la personne concernée pourrait être punie pour des activités d'un caractère politique ou soumise à de graves tribulations, et j'ai décrit brièvement à la Commission l'importance du programme d'aide extérieure du Canada. Les circonstances de la présence de l'appelant au Canada et la politique gouvernementale concernant les individus qui peuvent être sujets à persécution suivant expulsion et l'appelant a déclaré que si l'on procède à l'exécution de l'ordonnance, il serait persécuté et plusieurs personnes ont témoigné dans cette matière. La Commission doit maintenant rendre une décision et l'intimé n'a pas l'intention de quelque manière que ce soit d'influencer la Commission dans sa délibération sur le jugement à rendre. C'est tout, Monsieur le Président."

Cette représentation de l'intimé parle par elle-même.

Ainsi qu'elle y était tenue par la Loi même qui l'a créée de même que par les règles connues qui régissent l'administration de la preuve, la Cour dans ses délibérations a cerné la preuve pertinente à l'article 15(1) (b)(i) de la Loi de la Commission d'appel de l'immigration et la Cour est satisfaite que l'appelant a démontré l'existence de motifs raisonnables de croire que si l'on procède à l'exécution de l'ordonnance, l'appelant sera puni pour des activités d'un caractère politique ou soumis à de graves tribulations. Tant à l'enquête qu'au cours de l'audition de l'appel, l'appelant a affirmé son intention de retourner dans son pays dès que les circonstances le permettront. La Cour n'avait pas à se prononcer sur le programme de l'aide extérieure dans les cadres du Plan Colombo, mais elle retient que l'appelant a une obligation contractuelle de retourner dans son pays.

Par tous ces motifs la Cour ordonne de surseoir à l'exécution de l'ordonnance d'expulsion, sine die, avec obligation pour l'appelant de se présenter aux autorités de l'immigration à tous les six mois à compter de ce jour.

Le 8 mai 1970.

Ont souscrit: Gérard Legaré et F. Glogowski.

Pour l'appelant: Mes. B.S. Mergler et S. Bless;

Pour l'intimé: M. Jacques Pépin.

33. Marina MARI,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 20, 1970; File: 69-1036.

Coram: Jean-Pierre Houle, Vice-Chairman, F. Glogowski, Gérard Legaré.

Immigration Act - nature of in re a juvenile - whether Juvenile Court must be seized first - British North America Act: 92(14); Juvenile Delinquents Act (1952 RSC., c (20): 2(1)(h) and (2).

<u>Held</u>: It could not be said that the Immigration Act is a statute under which an infraction can be done or that can be violated. It follows that the Juvenile Delinquents' Act does not apply to a person of less than sixteen years - or less than eighteen when a province has invoked section 2(2) of the Juvenile Delinquents Act of Canada against whom a deportation order has been issued. Appeal dismissed on law.

The judgment of the Board was delivered by:

# F. Glogowski:

This is an appeal from a deportation order dated 14th April 1969, made by Special Inquiry Officer J.V. Bellemare at Montreal, Quebec, in respect of the appellant Marina Mari in the following terms:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you cannot or do not fulfill or comply with the conditions or requirements of this Act or the Regulations by reason of the fact that:
  - a) in the opinion of an Immigration officer, you would not on application be issued a visa or letter of pre-examination if outside of Canada for if examined outside Canada, you would have been refused admission pursuant to paragraph "a" of subsection (1) of Section 32 of the Immigration Regulations as an independent applicant because you are not a person 18 years of

33. Marina MARI,

appelante,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 20 mars 1970; Dossier: 69-1036.

Coram: Jean-Pierre Houle, vice-président, F. Glogowski, Gérard Legaré.

Loi sur l'immigration. - nature par rapport à un jeune délinquant - si en premier lieu l'affaire doit être amenée devant la Cour - Acte de l'Amérique du Nord Britannique: 92(14); Loi sur les jeunes délinquants (1952, SRC, c.(20): 2(1)(h) et (2).

Arrêt: Il semble que l'on ne pourrait dire que la Loi sur l'immigration constitue un statut à l'encontre duquel il est possible de commettre une infraction ou que l'on peut "violate". Il en découle que la Loi sur les jeunes délinquants ne s'applique pas à une personne âgée de moins de seize ans (ou de moins de dix-huit ans au Québec) qui tombe sous le coup d'une ordonnance d'expulsion.

L'appel est rejeté sur un point de Loi.

Le jugement de la Commission fut rendu par:

## F. Glogowski:

Appel d'une ordonnance d'expulsion rendue à Montréal le 14 avril 1969 par l'enquêteur spécial J.V. Bellemare contre Marina Mari, l'appelante. L'ordonnance d'expulsion dit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you cannot or do not fulfill or comply with the conditions or requirements of this Act or the Regulations by reason of the fact that:
  - a) in the opinion of an Immigration Officer, you would not on application be issued a visa or letter of pre-examination if outside of Canada for if examined outside Canada, you would have been refused admission pursuant to paragraph "a"

age or over who applies on her own behalf for admission to Canada for permanent residence as described in paragraph (c-b-) of Section 2 of the revised Immigration Regulations, Part I as required by paragraph "a" of subsection 3 of Section 34 of the Immigration Regulations, Part I.

- b) you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I, of the Immigration Act;
- c) your passport is not endorsed with any medical certificate duly signed by a medical officer and that you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I, of the Immigration Act."

The appellant was present at the hearing of her appeal together with her counsel, Mr. H. Blank, Q.C. The Respondent was represented by Mr. D. Bandy.

Miss Mari is a citizen of Greece. She arrived in Canada on the 9th July, 1968, and was allowed to enter as a visitor until the 30th October, 1968. On the 15th October, 1968, she applied for permanent admission. As she was born on the 24th May, 1951, she was under eighteen years of age at the time when she made her application and she was still under eighteen when the Inquiry was held.

She was ordered deported on the 14th April, 1969. After the deportation order was made she was married on the 5th July, 1969, to one Mr. Emmanuel Tsontakis, a Canadian citizen since 1968, age twenty-five, who is a native of Greece. The appellant stated at the hearing of her appeal that she was engaged prior to the Inquiry. She did not divulge this fact, however, as she did not think it was of great importance in her case at that time. She believed that she should marry her fiancé and then report this fact to the Immigration authorities, which she claims she did, after her marriage.

The appellant further stated that she was pregnant and expecting her child in the beginning of  $\mbox{\rm April},\ 1970\,.$ 

Her husband was not present at the hearing of her appeal. Mr. Blank, however, produced a letter form Reddy Memorial Hospital certifying that Mr. Tsontakis had undergone a surgical operation on the 19th February, 1970, and was in hospital on the day of the hearing of his wife's appeal.

of subsection (1) of Section 32 of the Immigration Regulations as an independent applicant because you are not a person 18 years of age or over who applies on her own behalf for admission to Canada for permanent residence as described in paragraph (c-b-) of section 2 of the revised Immigration Regulations, Part I as required by paragraph "a" of subsection 3 of Section 34 of the Immigration Regulations, Part I.

- b) you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I, of the Immigration Act;
- c) your passport is not endorsed with any medical certificate duly signed by a medical officer and that you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I, of the Immigration Act."

L'appelante, accompagnée par son conseiller M. Blank Q.C. était présente à l'audition de son appel. M. D. Bandy occupait pour l'intimé.

Mademoiselle Mari est une citoyenne de Grèce. Elle est arrivée au Canada le 9 juillet 1968 et a été autorisée à y entrer à titre de visiteur, son permis de séjour étant valide jursqu'au 30 octobre 1968. Le 15 octobre 1968 elle a présenté une demande d'admission permanente. Comme elle est née le 24 mai 1951, elle avait moins de dix-huit ans à l'époque de sa demande et elle avait encore moins de dix-huit ans lorsqu'on a tenu l'enquête.

Elle a été sommée d'expulsion le 14 avril 1969. Le 5 juillet 1969, après que l'ordonnance d'expulsion a été rendue, elle a épousé M. Emmanuel Tsontakis, citoyen canadien depuis 1968 âgé de vingt-cinq ans et originaire de Grèce. L'appelante a déclaré à l'audition de son appel qu'elle était fiancée avant le début de l'enquête. Toutefois, elle n'a pas révélé ce fait pensant qu'il n'était pas de grande importance pour sa cause à cette époque. Elle a crû qu'elle devait épouser son fiancé et ensuite rapporter ce fait aux autorités de l'immigration; c'est ce qu'elle prétend avoir fait après son mariage.

Par ailleurs, l'appelante a déclaré attendre un enfant pour le début du mois d'avril 1970.

M. Tsontakis n'était pas présent à l'audition de l'appel de son épouse. Toutefois, M. Blank a introduit une lettre portant l'en-tête de Reddy Memorial Hospital certifiant que M. Tsontakis a subi une opération

At the hearing of this appeal Mr. Blank contended that the Inquiry was not legal. On page 10 of the Transcript he stated as follows:

"It's my contention that the inquiry if illegal, nul and void right from the start. I didn't raise the point at the time, I didn't realize it. It's only after studying the matter that I realized it, in that it doesn't alter the situation -- if it was illegal when it started it's still illegal. I would like to quote to the Board the Juvenile Delinquents Act, Chapter 160 of the Revised Statutes of Canada. In paragraph (4) it says:

"Save as provided in section 9,..."

which talks about indictable offences

"... the Juvenile Court had exclusive jurisdiction "in the case of delinquency including cases where, "after the committing of the delinquency, the child "has passed the age limit mentioned in paragraph (a) "of subsection (1) of section 2."

The Juvenile Court referred to there, in Quebec, is a Social Welfare Court which was created by Chapter 20 of the Revised Statutes of Quebec, 1964. But I get to the definition of the juvenile delinquent -- in other words "what is covered by the Juvenile Delinquents Act and say this because we are now dealing with a decision that has -- there has been implications. My confrere himself read the judgement: "I hereby order you to be detained and to be deported" and the courts have held continuously that it's a penal offence or a quasipenal offence when the immigration inquiries result in subsequent detention and deportation. In the Juvenile Delinquents Act, paragraph 2(h):

"juvenile delinquent means any child who violates "any provisions of the Criminal Code or of any "Dominion or Provincial Statute..."

now, the Immigration Act is a Dominion Statute -- a violation of this Act by a juvenile -- and a juvenile in the Province of Quebec is one that has not attained the age of 18 -- that's the proclamation of the Lieutenant-Governor on the 3rd of November 1942 which conforms to the Juvenile Delinquents Act -- it gives the Province has the right to fix the age and where they don't fix the age it's 16 -- Newfoundland and Quebec have fixed the age at 18. Therefore we are dealing with a juvenile and the law is there, the law is clear. The only court that has jurisdiction over juveniles,

chirurgicale le 19 février 1970 et qu'il était hospitalisé le jour de l'audition de l'appel de son épouse.

À l'audition de cet appeal M. Blank a soutenu que l'enquête n'était pas légale. À la page 10 de la transcription il a déclaré:

"It's my contention that the inquiry is illegal, nul and void right from the start. I didn't raise the point at the time, I didn't realize it. It's only after studying the matter that I realized it, in that it doesn't alter the situation -- if it was illegal when it started it's still illegal. I would like to quote to the Board the Juvenile Delinquents Act, Chapter 160 of the Revised Statutes of Canada. In paragraph (4) it says:

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be an immigrant, be a foreigner, be a visitor, no matter how that juvenile got to this Province, the only court that has the right to deal primarily with a juvenile is the Social Welfare Court. The Social Welfare Court can then refer it to another court or appoint under the Juvenile Delinquents Act an inquiry officer as an officer of the court to try that individual but there are certain safeguards that go into it. One of the most important safeguards is the fact that the parents must be notified before the child is tried and that even goes where the Social Welfare Court refers the case to Criminal Court. The parents of the child must be notified because a child cannot -- is not capable of defending himself without notification of the parents. That's in the Juvenile Delinquents Act and that's in the Criminal Code. You find that right through the Code and in this case neither was the Social Welfare Court consulted nor was she referred there nor were her parents notified. So I say that the inquiry is absolutely nul and void. Now, I don't know whether this situation has come up before the Immigration Appeal Board or with the inquiry but it may be coming up in the future again because they have again modified the situation in the Monteal office, they now even refuse to take an application from people under 18 years of age. In this case they took an application of somebody under 18. Now, they refuse to allow them to sign the 1008 form claiming they are incapable. If they are incapable how can they be capable of going through an inquiry by the "same immigration officers or the same department that says they are incapable. But going all the way back to the law, unless the Juvenile Delinquents Act is amended, it's very clear:

"...any child..."

and she is a child or she was a child on April 14, 1969, because the record shows that she had not quite attained the age of 18,

"...who violates any Dominion Statute..."

and certainly the Immigration Act is a Dominion Statute and her order for her deportation was because she violated the statute or didn't conform to the statute and she was ordered detained and deported. Now, if that's not penal I don't know what is penal and the juveniles are treated differently than adults. She was a juvenile at that time and the immigration department had no business putting her before an inquiry officer without first referring her to juvenile court."

and Quebec have gixed the age at 18. Therefore we are dealing with a juvenile and the law is there, the law is clear. The only court that has jurisdiction over juveniles, be an immigrant, be a foreigner, be a visitor, no matter how that juvenile got to this Province, the only court that has the right to deal primarily with a juvenile is the Social Welfare Court. The Social Welfare Court can then refer it to another court or appoint under the Juvenile Delinquents Act an inquiry officer as an officer of the court to try that individual but there are certain safeguards that go into it. One of the most important safeguards is the fact that the parents must be notified before the child is tried and that even goes where the Social Welfare Court refers the case of Criminal Court. The parents of the child must be notified because a child cannot -- is not capable of defending himself without notification of the parents. That's in the Juvenile Delinquents Act and that's in the Criminal Code. You find that right through the Code and in this case neither was the Social Welfare Court consulted nor was she referred there nor were her parents notified. So I say that the inquiry is absolutely nul and void. Now, I don't know whether this situation has come up before the Immigration Appeal Board or with the inquiry but it may be coming up in the future again because they have again modified the situation in the Montreal office, they now even refuse to take an application from people under 18 years of age. In this case they took an application of somebody under 18. Now, they refuse to allow them to sign the 1008 form claiming they are incapable. If they are incapable how can they be capable of going through an inquiry by the "same immigration officers or the same department that says they are incapable. But going all the way back to the law, unless the Juvenile Delinquents Act is amended, it's very clear:

"...any child..."

and she is a child or she was a child on April 14, 1969, because the record shows that she had not quite attained the age of 18,

"...who violates any Dominion Statute..."

and certainly the Immigration Act is a Dominion Statute and her order for her deportation was because she violated the statute or didn't conform to the statute and she was ordered detained and deported. Now, if that's not penal I don't know what is penal and the juveniles are treated differently than adults. She was a juvenile at that time and the immigration department had no business putting her before an inquiry officer without first referring her to juvenile court."

Marina Mari is seventeen years old; a deportation order issued against her pursuant to the Immigration Act (1952 R.S.C., c. 325) enacted into law by the Federal Government by reason of its jurisdiction manifested in subsection 25 of Section 91 and Section 101 of the British North America Act.

Its true that the administration of justice in general belongs to the Provinces (subsection 14 of Section 92 of the British North America Act), but in the instant case a federal jurisdiction (i.e. immigration) was conferred upon a specific federal judicial apparatus i.e. the Immigration officer, the Special Inquiry Officer and the Immigration Appeal Board.

But, a federal statute - the Juvenile Delinquents Act (1952 R.S.C., c. 160) states that the special provincial tribunals dealing with youth, welfare and family, etc., have jurisdiction in all matters concerning young delinquents of less than sixteen years of age (pursuant to subsection 2 of Section 2, this age limit can be raised to eighteen years by the Province; it was done by Quebec). Section 2(1)(h) defines the juvenile delinquent as follows:

"2(1)(h): 'juvenile delinquent' means any child who violates any provision of the Criminal Code or of any Dominion or Provincial Statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by any reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or Provincial Statute".

Judge Irenée Lagarde States in his "Code Criminel Annoté" at page 1636:

"Le jeune délinquant est celui qui est reconnu comme ayant commis

- a) une infraction (ou un acte criminel) contrairement aux dispositions du code criminel;
- b) une infraction (ou un acte criminel) contrairement aux dispositions d'un statut fédéral;

etc. ...".

Semble, then, that the key word in Section 2(1)(h) is <u>violates</u> (or "infraction" in the French text). What is the nature of this word?

<u>Infraction</u>: (Robert, 'Dictionnaire Alphabétique et Analogique de la langue française")

Marina Mari est âgée de dix-sept ans; une ordonnance d'expulsion a été émise contre elle conformément à la Loi sur l'immigration (1952 S.R.C., c. 325); cette loi promulguée par le Gouvernement fédéral en raison de sa juridiction établie à l'alinéa 25 de l'article 91 et à l'article 101 de l'Acte d'Amérique du Nord britannique.

Il est vrai que l'administration de la justice en général relève de la province (alinéa 14 de l'article 92 de l'Acte d'Amérique du Nord britannique), mais en l'espèce une juridiction fédérale i.e. immigration) a été conférée à un appareil judiciaire fédéral particulier i.e. le fonctionnaire à l'immigration, l'enquêteur spécial et la Commission d'appel de l'immigration.

Or, un statut fédéral - la Loi sur les jeunes délinquants (1952 S.R.C., c. 160) prévoit que tous les tribunaux spéciaux provinciaux décidant sur ce qui à trait aux jeunes, au bien être social, à la famille, etc..., ont juridiction en toutes matière intéressant les jeunes délinquants âgés de moins de seize ans (conformément à l'alinéa 2 de l'article 2, la Province peut repousser cet âge limite jusqu'à dix-huit ans; ceci a été fait au Québec). L'article 2(1)(h) définit le jeune délinquant ainsi:

"2(1)(h): 'jeune délinquant' signifie un enfant qui commet une infraction à quelqu'une des dispositions du Code criminel, ou d'un statut fédéral ou provincial, ou d'un règlement ou ordonnance d'une municipalité, ou qui est coupable d'immoralité sexuelle ou de toute forme semblable de vice, ou qui, en raison de toute autre infraction, est passible de détention dans une école industrielle ou maison de correction pour les jeunes délinquants, en vertu des dispositions d'un statut fédéral ou provincial."

Irenée Lagarde déclare à la page 1636 de son 'Code Criminel annoté':

"Le jeune délinquant est celui qui est reconnu comme ayant commis

- a) une infraction (ou un acte criminel) contrairement aux dispositions du code criminel;
- b) une infraction (ou un acte criminel) contrairement aux dispositions d'un statut fédéral;

etc...".

Il semble que le mot significatif de l'article 2(1) (h) soit infraction (ou violates dans le texte anglais). Quelle est le sens de ce mot:

<u>Infraction</u>: (Robert, 'Dictionnaire Alphabétique et Analogique de <u>la langue</u> française'')

n.f. (1250; bas lat. infractio, de frangere, briser) Violation d'un engagement, d'une loi ... V. Enfreindre; attentat, contravention, dérogation, faute (11), manquement, rupture, transgression, violation. Infraction à la foi jurée. Infraction à un traité (V. Accroc). Infraction à une règle, au règlement, à la discipline (Cf. Enfermer, cit.3), au droit des gens ... Commandement, ordre qui ne souffre aucune infraction. V. Dérogation. Infraction à la loi (Cf. infra, Absolt.), à la coutume.

--Absol. et spécialt. Dr. Crim. 'Violation d'une loi de l'Etat, résultant d'un acte externe de l'homme, positif ou négatif, et qui est frappé d'une peine" (Donnedieu de Vabres). V. Délit\* 1 (11, 1°). Catégories d'infractions. V. Crime (2°); délit 1(11, 2°); contravention. Infraction disciplinaire. Elément légal (légalité), élément matériel (commission, ommission), élément psychologique ou moral (intention) d'une infraction. Sanction de l'infraction (V. Peine\*; amende ....). -- Commettre d'une infraction; commission d'une infraction. L'auteur de l'infraction. V. Coupable, délinquant, infracteur (intra, dér.).

Violation: (The Shorter Oxford Dictionary)

The action of violating. L. Infringement, flagrant disregard or non-observance of some principle or standard of conduct or procedure, as an oath, promise, law, etc.; an instance of this. 2. The action of treating or handling violently and injuriously - 1699. 3. a. Defilement of chastity, etc.; in later use esp. by means of violence 1497. b. Ravishment, outrage, rape 1599. 4. Desecration or profanation of something sacred 1546.

1. V. of the principles of the constitution Gibbon. A flagrant v. of treaty 1863. 4. the v. of a sacred place by murder 1856.

The Board has, on previous occasions, dealt with the nature of the Immigration Act. In its decision rendered in the appeal of Turpin v. Minister of Manpower and Immigration (1969) Volume 1, Immigration Appeal Cases, the Board states as follows:

"As Me Zaitlin himself admitted, and as held by the British Columbia Supreme Court in Re: Vergakis, (1964) 49 W.W.R. 720, with which the Board agrees on this point, the Immigration Act is not a criminal, it is a civil statute. In Vaaro v. R. (1933) S.C.R. Lamont J. said "There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge." Part VI of the Act does specifically create certain offences, but those Section of the Act with which we are now concerned, notably Part I - III of the Act, simply set up certain standards, though

n.f. (1250; bas lat. infractio, de frangere, briser) Violation d'un engagement, d'une loi ... V. Enfreindre; attentat, contravention, dérogation, faute (11), manquement, rupture, transgression, violation. Infraction à la foi jurée. Infraction à un traité (V. Accroc). Infraction à une règle, au règlement, à la discipline (Cf. Enfermer, cit. 3), au droit des gens... Commandement, ordre qui ne souffre aucune infraction. V. Dérogation. Infraction à la loi (Cf. infra, Absolt.), à la coutume.

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#### Violation: (The Shorter Oxford Dictionary)

The action of violating. 1. Infringement, flagrant disregard or non-observance of some principle or standard of conduct or procedure, as an oath, promise, law, etc.; an instance of this. 2. The Action of treating or handling violently and injuriously - 1699. 3. a. Defilement of chastity, etc.; in later use esp. by means of violence 1497. b. Ravishment, outrage, rape 1599. 4. Desecration or profanation of something sacred 1546.

1. V. of the principles of the constitution Gibbon. A flagrant v. of treaty 1863. 4. the v. of a sacred place by murder 1856.

La Commission s'est déjà prononcée sur la signification de la Loi sur l'immigration. Dans la décision rendue dans l'appel de Turpin c. le Ministre de la Main-d'oeuvre et de l'Immigration (1969) Volume 1, des affaires d'immigration en appel, la Commission déclare:

"As Me Zaitlin himself admitted, and as held by the British Columbia Supreme Court in Re: Vergakis, (1964) 49 W.W.R. 720, with which the Board agrees on this point, the Immigration Act is not a criminal, it is a civil statute. In Vaaro v. R. (1933) S.C.R. Lamont J. said "There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge". Part VI of the Act does specifically create

though admittedly in a negative way, for the coming into, admission to, or remaining in Canada of persons wishing to do so, who are not citizens of Canada or domiciled in Canada or domiciled in Canada as defined by the Act. Failure to meet, or departure from these standards, may result in the making of a deportation order against the person concerned - a result which may or may not be punitive - but in no sense can such failure be construed as an offence - an infraction of the law - it is at most non-compliance with standards set up by law."

Lagarde at pages 9 and 10, op. cit., enumerates the Federal Statutes containing punitive penal elements or infractions; the Immigration Act is not one of them.

Semble, then that it could not be said that the Immigration Act is a Statute under which an infraction can be done or that can be violated.

It follows that the Juvenile Delinquents Act does not apply to a person of less than sixteen years (or less than eighteen in Quebec) against whom a deportation order has been issued.

Mr. Blank's objection then cannot be received.

Accordingly, the Board finds that paragraph (a) of the third ground in the Order is valid and legal. The appellant admitted that she was not in possession of a valid and subsisting immigrant visa and that she lacked the required medical documentation. It is clear from the evidence that Miss Mari is not a Canadian citizen and that she is not a person having Canadian domicile within the meaning of the Immigration Act.

The Board finds, therefore, that all the grounds set out in the deportation order are valid grounds and that the deportation order was made in accordance with the provisions of the Immigration Act and Regulations. Accordingly, the Board dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

Having dismissed the appeal under Section 14 of the Immigration Appeal Board Act, the Board considered the application of Section 15(1) of the Immigration Appeal Board Act. The appellant is not a landed immigrant therefore the applicable subsections are (b)(i) and (ii).

In the circumstances of this case the Board came to the conclusion that there are grounds for the granting of special relief. This young woman came to Canada when she was only seventeen years old. In her evidence given under oath at the hearing of her appeal she stated that she was engaged prior to the Inquiry. At present, she is married to a Canadian citizen and at the hearing of her appeal she certain offences, but those Sections of the Act with which we are now concerned, notably Parts I - III of the Act, simply set up certain standards, though admittedly in a negative way, for the coming into, admission to, or remaining in Canada of persons wishing to do so, who are not citizens of Canada or domiciled in Canada as defined by the Act. Failure to meet, or departure from these standards, may result in the making of a deportation order against the person concerned - a result which may or may not be punitive - but in no sense can such failure be construed as an offence - an infraction of the law - it is at most non-compliance with standards set up by law."

Lagarde aux pages 9 et 10 énumère les lois fédérales qui créent les infractions ou des actes criminels qui y réfèrent; la Loi sur l'immigration ne s'y trouve pas.

Il semble donc que l'on ne pourrait dire que la Loi sur l'immigration constitue un statut à l'encontre duquel il est possible de commettre une infraction, ou que l'on peut "violate".

Il en découle que la Loi sur les jeunes délinquants ne s'applique pas à une personne âgée de moins de seize ans (ou de moins de dix-huit ans au Québec) qui tombe sous le coup d'une ordonnance d'expulsion.

L'objection de M. Blank ne peut être accueillie.

Conséquemment, la Commission déclare que le sous-alinéa (a) du troisième motif de l'ordonnance est valide et légal. L'appelant a admis ne posséder ni visa valide et non périmé ni les papiers médicaux prescrits. D'après la preuve il est manifeste que Mademoiselle Mari n'est pas une citoyenne canadienne et qu'elle n'a pas acquis le domicile canadien (termes pris dans le sens utilisé par la Loi sur l'immigration).

En conséquence, la Commission déclare que tous les motifs exposés dans l'ordonnance d'expulsion sont valides et que l'ordonnance d'expulsion a été rendue en conformité des dispositions de la Loi sur l'immigration et du Règlement.

Après avoir rejeté l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission examine cette affaire selon l'article 15(1) de la Loi sur la Commission d'appel de l'immigration. Puisque l'appelante n'est pas une immigrante reçue, seuls les alinéas (b)(i) et (ii) la visent.

D'après les circonstances entourant cette affaire la Commission conclue à l'existence de motifs qui justifient l'octroi d'un redressement spécial. Cette jeune femme est venue au Canada lorsqu'elle était âgée seulement de dix-sept ans; à l'audition de son appel elle a déclaré sous serment qu'elle était fiancée avant la tenue de l'enquête. À présent,

informed the Board that she was pregnant and expected her child at the beginning of April, 1970. Accordingly, the Board is of the opinion that the humanitarian approach in this particular case is to stay the Order of Deportation.

The Board, therefore, orders and directs that pursuant to Section 15 of the Immigration Appeal Board Act the execution of the Order of Deportation made against the appellant on the 14th of April, 1969, be and the same is hereby stayed until the 19th day of March, nearest Immigration Office every three months commencing the 19th day of June, 1970, during the period of the said stayed execution of the Order of Deportation.

Dated at Ottawa this 19th day of May, 1970.

Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the appellant: H. Blank, Q.C.; For the respondent: D. Bandy, Esq.

elle a épousé un citoyen canadien et à l'audition de son appel elle a informé la Commission qu'elle attendait un enfant pour le début d'avril 1970. En conséquence, la Commission estime que les motifs d'ordre humanitaire demandent de surseoir à l'ordonnance d'expulsion.

En conséquence la Commission ordonne et prescrit que, conformément à l'article 15 de la Loi sur la Commission d'appel de l'immigration, l'exécution de l'ordonnance d'expulsion rendue contre l'appelante le 14 avril 1969, soit par la présente suspendue jusqu'au 19 mars 1971. Par ailleurs, la Commission ordonne que durant la période de suspension de l'ordonnance d'expulsion l'appelante se présente au bureau de l'immigration le plus proche tous les trimestres à dater du 19 juin 1970.

Fait à Ottawa le 19 mai 1970.

Ont souscrit: Jean-Pierre Houle et Gérard Legaré.

Pour l'appelante: Me H. Blank, c.r.;

Pour l'intimé: M. D. Bandy.

34. Siu Kun YEUNG,

appellant,

ν.

The Minister of Manpower and Immigration

respondent.

Date of the decision: November 27, 1969; File: 69-1954.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Vice-Chairman, J.A. Byrne

Inquiry - based on arrest and section 26 direction - scope. - Immigration Appeal Board - grounds not in order added on appeal - conditions for - Res judicata - nature of - whether applicable in immigration matters - Immigration Act: 11(2)(3), 16, 19(1)(e)(vii), 23, 26, 28(4), 29; Immigration Appeal Board Act: 14(c); Immigration Appeal Board Rules: 4(5)(6).

 $\overline{\text{Act}}$ , the Special Inquiry Officer has authority to inquire into all the existing facts relevant to subsections (vii), (viii), (ix) and (x) of section 19(1) referred to in the section 26 direction and no more. When he makes a decision to order deportation on one or more of these grounds, and there is an appeal under section 11 of the Board's Act, this Court has jurisdiction to deal with such of the grounds properly inquired into by the Special Inquiry Officer, whether he based his decision on them or not.

Where, as in the first inquiry in this case, three of the four possible grounds were inquired into but the deportation order was based only on one, this Court has jurisdiction to deal with the other grounds, if they were properly inquired into, but it will not do so automatically. If the Minister seeks to enforce this whole "cause of action" when the matter comes to appeal, he must ask for it. If he does not, he cannot raise the matter again by another inquiry held subsequent to the decision on the appeal, since his whole cause of action is merged in the judgment of this Court.

But, the appellant must know the case he has to meet on his appeal. He is simply appealing from the order of deportation as it stands, and section 19(2) of the Board's Act does not excuse the Minister from failing to give notice where new grounds are sought to be added at the appeal stage.

Since two of the three conditions precedent to the proper bringing of the "cause of action" before the Court, namely a full inquiry into all possible grounds, a request to the Court, and adequate notice of the

34. Siu Kun YEUNG,

appelant,

С.

Le Ministre de la Main d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 27 novembre 1969; Dossier: 69-1954.

<u>Coram</u>: Mlle J.V. Scott, président, Jean-Pierre Houle, viceprésident, J.A. Byrne.

Enquête - fondée sur arrestation et sur dispositions de l'art. 26 - portée - C.A.I. - motifs ne figurant dans l'ordonnance mais ajoutés lors de l'appel - conditions pour - Chose jugée - nature - si applicable en matière d'immigration. - Loi sur l'immigration 11(2)(3), 16, 19(1)(a)(vii), 23, 26, 28(4), 29; Loi sur la Commission d'appel de l'immigration: 14(c); Règles de la Commission d'appel de l'immigration: 4(5)(6).-

Arrêt: Lorsqu'une arrestation est effectuée en conformité de l'article 16, l'enquêteur spécial a les pouvoirs d'examiner tous les faits existants qui relèvent des paragraphes (vii), (viii), (ix) et (x) de l'article 19(1) tels que cités dans l'ordre émis en vertu de l'article 26 uniquement. Quand l'enquêteur spécial établit une ordonnance d'expulsion sur l'un (ou plusieurs) de ces motifs et qu'ensuite il y a appel conformément à l'article 11 de la loi organique de la Commission, cette cour a la compétence de considérer les motifs régulièrement examinés par l'enquêteur spécial, qu'il ait fondé sa décision sur l'un d'eux ou sur aucun.

Lorsque l'enquêteur spécial examine trois des quatre motifs susceptibles d'être valides alors que l'ordonnance ne se fonde que sur un seul motif, tel que dans l'affaire en instance, la cour a compétence pour étudier les autres motifs afin de déterminer s'ils ont été régulièrement examinés; mais cette pratique n'est pas systématique. Si le Ministre cherche à faire valoir l'ensemble de la cause de l'action en justice en appel, il doit le demander. Sinon il ne peut à nouveau soulever l'affaire en faisant tenir une autre enquête puisque l'ensemble de la cause de l'action est novée par le jugement rendu par la cour.

Mais, l'appelant doit connaître les points auxquels il devra répondre en l'appel. Il en appelle simplement de l'ordonnance d'expulsion telle que présentée, et l'article 19(2) de la loi organique de la Commission n'excuse pas le défaut de donner avis quand, durant l'appel, le Ministre cherche à introduire des nouveaux motifs.

request to the appellant, were missing in the first appeal, the respondent is estopped from endeavouring to deport the appellant a second time on the same grounds based on the same evidence.

Also, though section 29 of the Immigration Act precludes the operation of the doctrine of res judicata as between two or more decisions by a Special Inquiry Officer between the same parties, if there is no question of an appeal, within its jurisdiction, the Board is a Court of appeal and the doctrine of res judicata applies to its decisions.

A direct statutory provision, and not merely the existence of section 29 of the Immigration Act, would be required to abrogate the operation of this fundamental doctrine in relation to the Board's decisions.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

This is an appeal from an order of deportation made at Headingley, Manitoba, on November 5, 1969, by Special Inquiry Officer J.R. Bonnallo, against the appellant, Siu Kun YEUNG, in the following terms:

" (i) you are not a Canadian citizen;

(ii) you are not a person having Canadian domicile,

(iii) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you eluded examination under this Act,

(iv) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada by reason of stealth and by fraudulent means,

(v) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which you came into Canada,

(vi) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

The appellant did not appear or make submissions at the hearing of his appeal; the respondent filed written submissions over the signature of A.S. Vass.

Trois conditions précédent l'administration régulière de la "cause de l'action" devant la cour: une enquête entière sur tous les motifs possibles, une demande présentée à la cour, un avis de la requête fourni à l'appelant. Attendu que dans le premier appel seulement une condition est satisfaite, l'intimé ne peut donc pas de nouveau chercher à expulser l'appelant pour les mêmes motifs fondés sur la même preuve.

De plus, même si l'article 29 de la Loi sur l'immigration empêche l'application de la doctrine de la chose jugée à deux décisions ou plus d'un enquêteur spécial entre les mêmes parties, s'il n'est pas question d'appel, la Commission est, à l'intérieur de sa juridiction, une cour d'appel et la doctrine de la chose jugée s'applique à ses jugements.

En ce qui regarde les décisions de la Commission d'appel de l'immigration, seule une disposition statutaire précise et non la simple existence de l'article 19 de la Loi sur l'immigration pourrait annuler l'effet de cette doctrine fondamentale quant aux décisions de la Commission.

Le jugement de la Commission fut rendu par:

## M11e J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue le 5 novembre 1969 à Headingley, Manitoba, par M. S.R. Bonnallo, enquêteur spécial, contre Siu Kun YEUNG, l'appelant. L'ordonnance dit:

" (i) you are not a Canadian citizen;

(ii) you are not a person having Canadian domicile,

(iii) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you eluded examination under this Act,

(iv) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada by reason of stealth and by fraudulent means,

(v) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which you came into Canada,

(vi) you are subject to deportation in accordance with subsection (2) of Section 19 of the

Immigration Act. "

Evidence adduced at the inquiry held November 5, 1969, shows that Mr. Yeung joined the ship Schouwen in Ireland on or about September 5, 1969. The ship proceeded directly from Ireland to Churchill, Manitoba, and arrived there about 27th or 28th of September 1969. On September 30, 1969, Mr. Yeung left the ship and did not return. The M/V Schouwen departed from Churchill on October 1, 1969, which fact was proved by a telex from the Department of Transport, Churchill, to the Canada Manpower Centre, Winnipeg, filed as Exhibit C to the Minutes of Inquiry. Mr. Yeung also testified (page 19, Minutes of Inquiry, November 5, 1969): when questioned by the Special Inquiry Officer:

- "Q. To your knowledge has the Schouwen left Canada?
- A. I believe it has left Canada a long time ago."

In addition, the Crew Index Card relating to Mr. Yeung, but incomplete in that it does not show whether he was a "deserter" or "other" was filed as Exhibit D to the Minutes of Inquiry of November 5, 1969.

The evidence taken as a whole would support paragraph (v) of the deportation order made November 5, 1969.

Mr. Yeung failed to report to an Immigration Officer when he left his ship at Churchill, Manitoba. Questioned by the Special Inquiry Officer he testified (page 13, Minutes of Inquiry of November 5, 1969):

- "Q. Did you know that to come ashore from the ship and remain that you must have the authority of the Immigration Department at the respective country that the ship may call at?
- A. I did not know at that time."

#### and at page 14:

- "Q. Did you try to locate a Canadian Immigration Officer?
- A. No I did not know where he was.
- Q. Why did you not try and find out where he was?
- A. I intended to go to Montreal and then go to the Immigration Officer there. I thought it was no use to find an Immigration Officer in Churchill.
- Q. Why did you consider it was no use?
- A. Because I myself do not know English."

L'appelant ne s'est pas présenté à l'audition de son appel; de plus il n'y a déposé aucune plaidoirie; l'intimé a déposé une plaidoirie écrite portant la signature de M. A.S. Vass.

La preuve administrée à l'enquête tenue le 5 novembre 1969 montre que le ou vers le 5 septembre 1969 M. Yeung s'est embarqué sur le navire Schouwen, alors en Irlande. Le navire a ensuite quitté l'Irlande pour Churchill au Manitoba; il est arrivé dans ce port le 27 ou le 28 septembre 1969. Le 30 septembre 1969 M. Yeung a quitté le bord du Schouwen et n'a pas réembarqué. Le M/V Schouwen a laissé Churchill le ler octobre 1969; ceci est prouvé par une transcription au téléscripteur envoyée de Churchill par le ministère du Transport au Centre de placement du Canada à Winnipeg. On a déposé cette transcription en pièce à l'appui du procès-verbal de l'enquête. M. Yeung interrogé par l'enquêteur spécial a aussi déclaré (p. 19 du procès-verbal de l'enquête du 5 novembre 1969):

- "Q. To your knowledge has the Schouwen left Canada?
  - A. I believe it has left Canada a long time ago."

De plus, la carte indicatrice d'équipage à l'égard de M. Yeung, bien qu'incomplète en ce sens qu'elle ne montre pas s'il est "déserteur" ou "autre" a été déposé en pièce à l'appui D au procès-verbal de l'enquête du 5 novembre 1969.

L'ensemble de la preuve viendrait au soutient de l'alinéa (v) de l'ordonnance d'expulsion rendue le 5 novembre 1969.

- M. Yeung a omis de faire savoir à un agent de l'immigration qu'il avait quitté son navire à Churchill, Manitoba. Interrogé par l'enquêteur spécial il a déclaré (page 13 du procès-verbal de l'enquête du 5 novembre 1969):
  - "Q. Did you know that to come ashore from the ship and remain that you must have the authority of the Immigration Department at the respective country that the ship may call at?
    - A. I did not know at that time."

ensuite à la page 14:

- "Q. Did you try to locate a Canadian Immigration Officer?
  - A. No I did not know where he was.
  - Q. Why did you not try and find out where he was?
  - A. I intended to go to Montreal and then go to the Immigration Officer there. I thought it was no

#### and at page 15:

- "Q. Would I be correct in assuming that when you left your ship in Churchill that you did not report to an Immigration Officer for fear that you might be returned to the ship?
- A. First of all I did not and I still do not know any English that is why I did not report to an Immigration Officer. Secondly, if I had reported to an Immigration Officer I am sure I would have been sent back to the ship. If the master of the ship had known this I would not have been able to work as a seaman any more.
- Q. Is it correct then that you did not wish to report to anyone and wished to remain in Churchill unobserved by an officer until you could catch the train out of Churchill?
- A. Yes.
- Q. Then you understood that you were required to report to an Immigration Officer for permission to remain in Canada is that correct?
- A. Yes but I wanted to proceed to Montreal first before reporting to an Immigration Officer."

This evidence would support paragraph (iii) of the deportation order made November 5, 1969, namely that Mr. Yeung "eluded examination under the Act."

Mr. Yeung endeavoured to proceed from Churchill to Winnipeg en route to Montreal. He took the Winnipeg train from Churchill on September 30, 1969, but when the train stopped at The Pas he was arrested by a police officer and charged with an offence under the Immigration Act, namely, that he had entered Canada by stealth and by fraudulent means. He pleaded guilty to this charge and was convicted. No certificate of conviction was produced or filed at the inquiry of November 5, 1969, but Mr. Yeung testified (page 18):

- "Q. Did you admit then by your plea that you entered Canada by stealth and fraudulent means?
- A. Yes."

use to find an Immigration Officer in Churchill.

- Q. Why did you consider it was no use?
- A. Because I myself do not know English."

## puis à la page 15:

- "Q. Would I be correct in assuming that when you left your ship in Churchill that you did not report to an Immigration Officer for fear that you might be returned to the ship?
  - A. First of all I did not and I still do not know any English that is why I did not report to an Immigration Officer. Secondly, if I had reported to an Immigration Officer I am sure I would have been sent back to the ship. If the master of the ship had known this I would not have been able to work as a seaman any more.
  - Q. Is it correct then that you did not wish to report to anyone and wished to remain in Churchill unobserved by an officer until you could catch the train out of Churchill?
  - A. Yes.
- Q. Then you understood that you were required to report to an Immigration Officer for permission to remain in Canada is that correct?
- A. Yes but I wanted to proceed to Montreal first before reporting to an Immigration Officer."

Cette preuve viendrait au soutien de l'alinéa (iii) de l'ordonnance d'expulsion rendue le 5 novembre 1969, à savoir que M. Yeung "s'est soustrait à l'examen prévu par la Loi".

M. Yeung a entrepris d'aller de Churchill à Montréal en passant par Winnipeg. Le 30 septembre 1969 il a pris le train pour Winnipeg à la gare de Churchill, mais lorsque le train s'est arrêté à Le Pas, un agent de police l'a arrêté et inculpé pour avoir enfreint la Loi sur l'immigration, plus précisement pour être entré au Canada par des "moyens détournés et frauduleux". A cette accusation il a plaidé coupable et a été condamné. Aucun certificat de condamnation n'a été administré ou déposé à l'enquête tenue le 5 novembre 1969, mais M. Yeung a déclaré:

"Q. Did you admit then by your plea that you entered Canada by stealth and fraudulent means?

This evidence gives some colour of legality to paragraph (iv) of the deportation order made November 5, 1969 although it must be stated that if this order were otherwise in accordance with the law this paragraph thereof would probably be contrary to law as being unsupported by the evidence: the fact of conviction is no proof of the circumstances invoked and indeed there appears to be no real evidence that Mr. Yeung "entered Canada by stealth or fraudulent means". The issue, however, was before the Special Inquiry Officer and he, in part at least, inquired into it.

There can be no doubt in the evidence adduced at the inquiry of November 5, 1969 that Mr. Yeung was not a Canadian citizen nor was he a person "having Canadian domicile" within the meaning of the Immigration Act-

The evidence adduced at the inquiry of November 5, 1969, supports the grounds of deportation set out in the deportation order of the same date, with the possible exception of paragraph (iv) thereof, and if there were nothing further that order would be in accordance with the law. The deportation order of November 5, 1969 is, however, absolutely null and void, since the matter was res judicata at the time it was made.

 $\,$  Mr. Yeung was ordered deported on October 9, 1969 on the following grounds:

- " (i) you are not a Canadian citizen,
  - (ii) you are not a person having Canadian domicile,
  - (iii) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which you came into Canada.
  - (iv) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

The inquiry resulting in this order was held the same day, October 9, 1969, and the evidence thereof adduced was almost identical, except for one salient factor, as that adduced at the inquiry of November 5, 1969. On October 9, 1969, Mr. Yeung testified that he left the ship Schouwen on September 30, 1969, at Churchill, Manitoba, and did not return. The evidence as to the departure of the vessel from Canada was as follows: (page 10, Minutes of Inquiry of October 9, 1969):

Cette preuve vient quelque peu au soutien de l'alinéa (iv) de l'ordonnance d'expulsion rendue le 5 novembre 1969; toutefois il faut déclarer que si l'ordonnance était d'autre part conforme à la loi, le dit alinéa irait à l'encontre de la loi puisqu'il ne serait pas soutenu par la preuve: la condamnation ne prouve pas les circonstance dont elle découle et même, il appert qu'aucune preuve n'ait montré que M. Yeung est "entré au Canada clandestinement ou par des moyens frauduleux." La question cependant, a été amenée devant l'enquêteur spécial qui l'a étudiée au moins en partie.

D'après la preuve administrée à l'enquête du 5 novembre 1969, il est évident que selon les termes de la Loi sur l'immigration, M. Yeung n'est ni citoyen canadien ni une personne "ayant acquis le domicile canadien".

La preuve administrée à l'enquête du 5 novembre 1969 confirme les motifs d'expulsion définis dans l'ordonnance d'expulsion rendue le 5 novembre 1969 (si l'on excepte le paragraphe (iv) de l'ordonnance), et si l'ordonnance n'avait mentionné rien de plus elle aurait été établie en conformité de la Loi. Cependant, l'ordonnance d'expulsion rendue le 5 novembre 1969 est tout à fait nulle et non avenue attendu qu'à l'époque de son établissement la question était chose jugée (res judicata).

Le 9 novembre 1969 M. Yeung se voyait expulsé pour les motifs suivants:

- " (i) you are not a Canadian citizen,
  - (ii) you are not a person having Canadian domicile,
  - (iii) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the yehicle on which you came into Canada.
    - (iv) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act. "

L'enquête qui a fait suite à l'ordonnance a été tenue le 9 octobre 1969 et, si l'on excepte un facteur important, la preuve administrée à cette enquête était identique à celle administrée à l'enquête du 5 novembre 1969. Le 9 octobre 1969 M. Yeung a déclaré avoir quitté le Schouwen le 30 septembre 1969; le navire était dans le port de Churchill, Manitoba et l'appelant n'y a pas réembarqué. La preuve relative au fait que le navire ait quitté le Canada est la suivante: (page 10 des minutes de l'enquête du 9 octobre 1969):

- "Q. On what date was your ship due to leave Churchill?
- A. I do not know.
- Q. To your knowledge, has the "M/V Schouwen" left Canada?
- A. I believe it has left Canada.
- Q. Were you on board the ship when it left Canada?
- A. No."

The only other "evidence" on this point was the  $\underline{\text{defective}}$  Crew Index Card, afore-mentioned, filed as Exhibit B to the  $\underline{\text{Minutes}}$  of Inquiry of October 9, 1969.

At the inquiry, Mr. Yeung testified further (page 10):

- "Q. After you left the ship at Churchill, did you apply to an Immigration Officer for permission to remain in Canada?
- A. No, I did not. I did not know if there was any Immigration Officer in Churchill. I intended to go to Montreal to work as a cook.
- Q. Did you have any intention of applying to an Immigration Officer for permission to remain in Canada?
- A. I wanted to go to Montreal; then I would ask my friend to take me to the Immigration Office to apply for permanent residence.
- Q. Do you admit having remained in Canada without the approval of an Immigration Officer after the departure of the ship on which you came to this country?
- A. Yes, I do. Because I did not have permission from the Immigration Department to remain in Canada, I was sentenced to 30 days in gaol.
- Q. Then you understood you were required to report to a Canadian Immigration Officer for permission to remain in Canada?
- A. Yes."

- "Q. On What date was your ship due to leave Churchill?
- A. I do not know.
- Q. To your knowledge, has the "M/V Schouwen" left Canada?
- A. I believe it has left Canada.
- Q. Were you on board the ship when it left Canada?
- A. No. "

La seule "preuve" supplémentaire sur ce point est la carte indicatrice d'équipage <u>incomplète</u> (defective) mentionnée plus haut et déposée en pièce à l'appui B au procès-verbal de l'enquête du 9 octobre 1969.

- A l'enquête M. Yeung a déclaré (page 10):
- "Q. After you left the ship at Churchill, did you apply to an Immigration Officer for permission to remain in Canada?
  - A. No, I did not. I did not know if there was any Immigration Officer in Churchill. I intended to go to Montreal to work as a cook.
  - Q. Did you have any intention of applying to an Immigration Officer for permission to remain in Canada?
  - A. I wanted to go to Montreal; then I would ask my friend to take me to the Immigration Office to apply for permanent residence.
  - Q. Do you admit having remained in Canada without the approval of an Immigration Officer after the departure of the ship on which you came to this country?
  - A. Yes, I do. Because I did not have permission from the Immigration Department to remain in Canada, I was sentenced to 30 days in gaol.
  - Q. Then you understood you were required to report to a Canadian Immigration Officer for permission to remain in Canada?
  - A. Yes. "

He also testified as to the fact of his conviction pursuant to Section 50(b) of the Immigration Act and the certificate of conviction was filed as Exhibit C to the Minutes of Inquiry of October 9, 1969, showing that "the accused" was convicted on October 2, 1969, in that "the did unlawfully remain in Canada by stealth and by fraudulent means."

Evidence adduced at the inquiry of October 9, 1969, proves conclusively that Mr. Yeung "was not a Canadian citizen nor a person having Canadian domicile" within the meaning of the Immigration Act.

It will be noted that the sole ground in the order of deportation of October 9, 1969, was Section 19(1)(e)(x) of the Immigration Act. Mr. Yeung's appeal from that order was allowed on October 30, 1969. The judgment was handed down by A.B. Weselak, Acting Vice-Chairman; J.P. Houle and G. Legaré, members, concurring. After citing the evidence adduced in support of the order the learned members stated (page 3):

"Therefore the Board finds that there was no evidence before the Special Inquiry Officer which proved the departure of the vehicle and finds that the order is not made in accordance with the Immigration Act and Regulations thereunder."

It appears from the record that shortly after this decision of the Board was received by the Respondent, Mr. Yeung was arrested again and the second inquiry of November 5, 1969, was held pursuant to Section 25 of the Immigration Act. This resulted in the order of deportation dated November 5, 1969, above quoted.

The question arises whether the Board's judgment of October 30, 1969, is an estoppel of record, i.e. res judicata, so as to bar the inquiry of November 5, 1969, and consequently render the deportation order of the same date null and void.

The doctrine of res judicata seems to have been first definitively formulated by the courts of Kingston's (Duchess) Case (1776) 20 State Tr. 355, although the doctrine of estoppel in general is much more ancient, and is extensively commented on in Coke on Littleton. In Kingston's Case, the Court held, 1) that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter, directly in question in another court; 2) that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of a matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Il a aussi déclaré qu'en fait il a été condamné conformément à l'article 50(b) de la Loi sur l'immigration. Le certificat de condamnation a été déposé comme pièce à l'appui C du procès-verbal de l'enquête du 9 octobre 1969; cette pièce montre que "l'accusé" a été condamné le 2 octobre 1969 pour "être illégalement resté au Canada en utilisant des moyens détournés et frauduleux".

La preuve administrée à l'enquête du 9 octobre 1969 démontre, sans aucun doute possible, que selon les termes de la Loi M. Yeung n'est pas un citoyen canadien et il n'a pas acquis le domicile canadien".

Notons que le seul motif de l'ordonnance d'expulsion rendue le 9 octobre 1969 repose sur l'article 19(1)(e)(x) de la Loi sur l'immigration. Le 30 octobre 1969, la Commission a accueilli l'appel de cette ordonnance. M. A.B. Weselak, vice-président intérimaire a signifié le jugement; M. Jean-Pierre Houle et M. Gérard Legaré, membres de la Commission, y ont souscrit. Après avoir mentionné la preuve administrée au soutient de l'ordonnance les savants membres ont déclaré (p. 3):

"Therefore the Board finds that there was no evidence before the Special Inquiry Officer which proved the departure of the vehicle and finds that the order is not made in accordance with the Immigration Act and Regulations thereunder."

D'après le dossier, il apparaît que très peu de temps après la réception de cette décision par l'intimé, M. Yeung a été arrêté une fois de plus et la seconde enquête du 5 novembre 1969 a été tenue en vertu de l'article 25 de la Loi sur l'immigration. Ceci a amené l'ordonnance d'expulsion supra rendue le 5 novembre 1969.

La question soulevée est la suivante: le jugement de la Commission rendu le 30 octobre 1969 représente-il une fin de non-recevoir fondée sur le dossier (estoppel of record), i.e. chose jugée (res judicata), pour ainsi empêcher l'enquête du 5 novembre 1969 et rendre nulle et non avenue l'ordonnance d'expulsion rendue le même jour?

Il semblerait que la cour, dans la cause Kingston (Duchess)
Case (1776) 20 State Tr. 355, ait formulé pour la première fois et en
des termes précis, le principe de chose jugée (res judicata); cependant
le principe général de la fin de non-recevoir, beaucoup plus ancien lui,
a été développé d'une façon exhaustive dans Coke on Littleton. Dans
l'affaire Kingston, la cour a déclaré, l) que le jugement rendu dans
une affaire par une cour de compétence concurrente comme moyen de
défense constitue un empêchement, ou comme preuve est concluant entre
les mêmes parties dans une même affaire dont est saisie une autre cour;

The three 'unities' which must be present before res judicata can be invoked are set out in Pickford v. Daley, (1957) 7 D.L.R. (2d) 600 (N.S.S.C.) where, Doull, J. Stated (at page 604):

"To be a conclusive bar to a second action, the first action must have been

- (1) between the same parties or their privies ...
- (2) The matter in dispute must be identical in both proceedings, though it is not necessary that it should be the only point in issue in either or that the cause of action should be the same.
- (3) To raise an estoppel on the determination of a right it must, it would seem, have been brought for the same object ..."

With respect to identity of cause of action, however, the more commonly prevailing view is set out in Halsbury (2d Ed. Vol. 13, p. 411): "In order that a defence of res judicata may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the seond. A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties. Where the former judgment has been for the defendent, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed". He points out that the judgment in the first action must have been on the merits, and continues "The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it."

Osborne's Concise Law Dictionary, Ed. 5, states: "Res judicata presupposes that there are two opposing parties, that there is a different issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. ..."

Black defines res judicata: "Rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit (It) requires identity in thing sued for as well as identity of cause of action, of persons and parties to action ..."

2) que, de la même manière sur un point litigieux, le jugement signifié par une cour de compétence exclusive lie les mêmes parties, si ce point est soulevé pour des fins différentes devant une autre cour. Mais en aucun cas le jugement d'une cour de compétence concurrente ou exclusive fait-il preuve de toute chose qui, bien que de la compétence de cette cour, est collatéralement débattue, de même pour une affaire soulevée incidemment; le même raisonnement vaut pour toute question inférée par argument tiré du jugement.

Dans l'affaire Pickford c. Daley, (1957) 7 D.L.R. (2d) 600 (C.S.N.E.) sont définis les trois "éléments" qui doivent exister afin que la chose jugée (res judicata) soit invoquée; dans cette affaire le juge Doull a déclaré (p. 604):

"To be a conclusive bar to a second action, the first action must have been

- (1) between the same parties or their privies...
- (2) The matter in dispute must be identical in both proceedings, though it is not necessary that it should be the only point in issue in either or that the cause of action should be the same.
- (3) To raise an estoppel on the determination of a right it must, it would seem, have been brought for the same object ..."

Quant à ce qui regarde l'identité des causes d'actions en justice, le principe communément accepté est celui définit dans Halsbury (2eme Ed. Vol. 13, p. 411):

"In order that a defence of res judicata may succeed, it is necessary to show not only that the case of action was the same, but also that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties. Where the former judgment has been for the defendent, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be conduded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

He points out that "a prior judgment between same parties, which is not strictly res judicata because based upon different causes of action, operates as an "estoppel" only as to matters actually in issue or points controverted."

The principle nemo debet bis vexari pro eadem causa is a fundamental doctrine of law. It is probably to be found in all modern legal systems, and is certainly a very ancient doctrine. Though often loosely referred to as included in the concept of res judicata, it is more accurately described as merger by judgment. The distinction is clearly stated in the judgment of Middleton J.A. in McIntosh v. Parent (1924) 55 O.L.R. 552:

"Two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be retried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains ... The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the Courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever."

A problem in applying the doctrines of res judicata and merger by judgment to immigration matters is that the Immigration Act is neither a criminal statute (Re Vergakis (1964) 49 W.W.R. 720 (B.C.)) nor are procedures thereunder - inquiries for example - civil actions. An appeal to the Immigration Appeal Board is not a civil action nor is it an appeal from a decision in a civil action. This causes some difficulty in terminology when the matter reaches the appeal state.

What is the "cause of action" in an appeal to this Court pursuant to Section 11 of the Immigration Appeal Board Act? It is first necessary to examine the powers and duties of the lower tribunal - the Special Inquiry Officer - from whose decision the appeal lies.

Section 11 of the Immigration Act provides:

Il fait remarquer que le jugement de la première action en justice doit porter sur le fond; il poursuit:

"The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it."

## M. P.G. Osborne dans A Concise dictionary of Law (éd.5) déclare:

"Res judicata presupposes that there are two opposing parties, that there is a different issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. ..."

Black définit la chose jugée (res judicata) ainsi:

"Rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit (It) requires identity in thing sued for as well as identity of cause of action, of persons and parties to action ..."

## Il fait remarquer que

"a prior judgment between same parties, which is not strictly res judicata because based upon different causes of action, operates as an "estoppel" only as to matters actually in issue or points controverted."

Nemo debet bis vexari pro eadem causa est un principe fondamental de droit. Alors qu'on le trouve probablement dans tous les systèmes juridiques modernes, c'est une doctrine très ancienne. Bien que souvent il soit vaguement mentionné comme compris dans le concept de chose jugée (res judicata), il est plus précisément décrit comme novation par jugement (merger by judgment). Dans l'affaire McIntosh c. Parent (1924) 55 O.L.R. 552, le juge adjoint Middleton a clairement établi la distinction en déclarant:

"Two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a Court

- "11. (1) Immigration officers in charge are Special Inquiry Officers and the Minister may nominate such other immigration officers as he deems necessary to act as Special Inquiry Officers.
- (2) A Special Inquiry Officer has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported.
- (3) A Special Inquiry Officer has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry,
  - (a) issue a summons to any person requiring him to appear at the time and place mentioned therein, to testify to all matters within his knowledge relative to the subject matter of the inquiry, and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to the subject matter of the inquiry;
  - (b) administer oaths and examine any person upon oath, affirmation or otherwise;
  - (c) issue commissions or requests to take evidence in Canada;
  - (d) engage the services of such counsel, technicians, clerks, stenographers or other persons as he may deem necessary for a full and proper inquiry; and
  - (e) do all other things necessary to provide a full and proper inquiry."

Section 11(2) gives the Special Inquiry Officer authority "to inquire into and determine" whether a person is admissible to Canada or may remain in Canada or shall be deported. His inquiry, in any individual case, however, falls within a certain frame of reference.

As pointed out in Caruana v. Minister of Manpower and Immigration (I.A.B. December 3, 1969, unreported) the Immigration Act sets out various conditions precedent to instituting an inquiry:

- 1) a section 23 report valid as to form, or
- 2) a section 26 direction valid as to form, or
- 3) an arrest pursuant to section 16.

of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be retried in a subsequent suit between the same parties of their privies, though for a different cause of action. The right, question or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains ... The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the Courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever."

L'application des doctrines de chose jugée (res judicata) et novation par jugement (merger by judgment), aux affaires de l'immigration pose un problème car la Loi sur l'immigration n'est pas une loi pénale (voir Re Vergakis (1964) 49 W.W.R. 720 (C.B.)) et les procédures prévues par la Loi (les enquêtes par exemple) ne sont pas des actions civiles. Un appel devant la Commission n'est pas une action civile, ni un appel d'une décision dans une action civile. Ceci amène quelques difficultés au niveau de la terminologie quand l'affaire est présentée en appel. Quelle est la cause de l'action en justice dans un appel devant cette cour conformément à l'article ll de la Loi sur la Commission d'appel de l'immigration? En premier lieu, il nous faut examiner les pouvoirs et les devoirs du tribunal inférieur duquel la décision est en appel: l'enquêteur spécial.

# Article 11 de la Loi sur l'immigration stipule:

"11. (1) Les fonctionnaires supérieurs de l'immigration sont des enquêteurs spéciaux, et le Ministre peut nommer les autres fonctionnaires à l'immigration qu'il juge nécessaires pour agir en qualité d'enquêteurs spéciaux.

(2) Un enquêteur spécial a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être

expulsée, et celui de statuer en l'espèce.

(3) Un enquêteur spécial possède tous les pouvoirs et toute l'autorité d'un commissaire nommé en vertu de la Partie I de la Loi sur les enquêtes et, sans restreindre la généralité de ce qui précède, peut, aux fins d'une

enquête.

a) émettre une sommation à toute personne, lui enjoignant de comparaître aux temps et lieu y mentionnés, de rendre témoignage sur toutes questions à sa connaissance concernant le sujet de l'enquête et d'apporter avec elle et de produire tout document, livre ou pièce, en sa possession ou sous son contrôle, en ce qui regarde le sujet de l'enquête; An inquiry held pursuant to Section 25 after an arrest made by Minister's warrant issued pursuant to Section 15(1) would be based on either a Section 23 report or a Section 26 direction, and need not be mentioned further.

Section 23 provides:

"23. Where an immigration officer, after examination of a person seeking to come into Canada, is of opinion that it would or may be contrary to a provision of this Act or the regulations to grant admission to or otherwise let such person come into Canada, he may cause such person to be detained and shall report him to a Special Inquiry Officer."

Section 5 of the Immigration Inquiries Regulations  ${\rm SOR}/{\rm 67\text{-}621}$  provides:

"5. Where an immigration officer has caused a person seeking to come into Canada to be detained and has reported him to a Special Inquiry Officer pursuant to Section 23 of the Act, the report so made shall be in writing and shall set out the provisions of the Act or the Immigration Regulations by reason of which the immigration officer is of the opinion that the person should be granted admission or allowed to come into Canada."

The Section 23 report, therefore, sets out the grounds for the inquiry - in other words the case the person concerned has to meet. It has been held that a Special Inquiry Officer can, during an inquiry instituted by a Section 23 report, add in additional grounds, or even change the grounds, on proper notice to the subject of the inquiry (e.g. Haughton v. Minister of Manpower and Immigration, I.A.B. May 1969 unreported).

This is not the case where there is a Section 26 direction. Section 26 provides:

"26. Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under section 19 and where he considers that an inquiry is warranted, cause an inquiry to be held concerning the person respecting whom the report was made."

Section 6 of the Immigration Inquiries Regulations provides:

- b) faire prêter serment et interroger toute personne sous serment, affirmation ou autrement;
- c) émettre des commissions ou requêtes en vue de recueillir des témoignages au Canada;
- d) retenir les services des avocats, techniciens, commis, sténographes ou autres personnes qu'il estime indispensables à une enquête complète et régulière; et
- e) accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière.

L'article 11(2) donne à l'enquêteur spécial le pouvoir d'examiner et de statuer sur la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer, ou si elle doit être expulsée. Son enquête bien que particulière à chaque cas, se fonde sur une certaine compétence et juridiction.

Ainsi que l'a fait remarquer la Commission dans l'affaire Caruana c. le ministre de la Main-d'oeuvre et de l'immigration (C.A.I. non-rapportée, le 3 décembre 1969), la Loi sur l'immigration stipule que les conditions suivantes doivent précéder la tenue d'une enquête:

- 1) un rapport prévu à l'article 23 valide en bonne et due forme, ou
- l'ordre prévu à l'article 26, ordre valide en bonne et due forme, ou
- 3) une arrestation en vertu de l'article 16.

Une enquête tenue en vertu de l'article 25, subséquente à une arrestation en vertu de l'article 15(1) établie sur émission d'un mandat du Ministre serait fondée soit sur un rapport prévu à l'article 23 soit sur l'ordre prévu à l'article 26 et ne nécessite aucune procédure supplémentaire.

L'article 23 stipule que:

"23. Lorsqu'un fonctionnaire à l'immigration, après avoir examiné une personne qui cherche à entrer au Canada, estime qu'il serait ou qu'il peut être contraire à quelque disposition de la présente loi ou des règlements de lui accorder l'admission ou de lui permettre autrement de venir au Canada, il doit la faire détenir et la signaler à un enquêteur spécial."

L'article 5 du Règlement sur les enquêtes de l'immigration, DORS/67-621, stipule que:

"6. Where upon receipt of a report in respect of a person pursuant to section 19 of the Act, the Director causes an inquiry to be held concerning the person pursuant to section 26 of the Act, the direction causing the inquiry shall be in writing and shall set out the provisions of the Act or the Immigration Regulations that have occasioned the Director to cause an inquiry to be held."

It will be noted that the Director has discretion under Section 26 to cause an inquiry to be held, or not, as he sees fit, and he makes this decision on the basis of the Section 19 report made to him. The Special Inquiry Officer cannot, in the course of his inquiry, add in any new grounds, still less can he change the grounds.

## Section 16 provides:

"16. Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraphs (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

This is the section applicable to the present appeal, since the appellant was arrested thereunder prior to both inquiries held in respect of him.

Section 19(1)(e)(vii), (viii), (ix) and (x) provide:

- "19. (1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
  - (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
    - (vii) came into Canada at any place other than a port of entry or eluded examination or inquiry under this Act or escaped from lawful custody or detention under this Act,

"5. Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada, ni autorisée à y venir."

Le rapport prévu à l'article 23 expose les motifs de l'enquête - en d'autres termes les points sur lesquels la personne intéressée doit s'expliquer. Il a été soutenu, par exemple dans l'affaire Haughton c. le ministre de la Main-d'oeuvre et de l'Immigration, C.A.I. mai 1969 non-rapportée, que l'enquêteur spécial peut, en donnant avis à la personne intéressée, ajouter des nouveaux motifs à l'occasion d'une enquête ouverte sur un rapport prévu à l'article 23; il peut même modifier les motifs.

Ici, il ne s'agit pas de cela, mais d'un ordre prévu à l'article 26. L'article 26 stipule que:

"26. Sous réserve de tout ordre ou de toutes instructions du Ministre, le Directeur sur réception d'un rapport écrit prévu par l'article 19 et s'il estime qu'une enquête est justifiée, doit faire tenir une enquête au sujet de la personne visée par le rapport."

L'article 6 du Règlement sur les enquêtes de l'immigration stipule que:

"6. Lorsque le Directeur, au reçu d'un rapport concernant une personne fait selon l'article 19 de la Loi, décide de faire tenir une enquête au sujet de ladite personne, conformément à l'article 26 de la Loi, l'ordre de tenir l'enquête doit être donné par écrit et doit faire mention des dispositions de la Loi ou du Règlement sur l'immigration aux termes desquelles le Directeur a jugé bon d'ordonner la tenue d'une enquête."

Notons qu'aux termes de l'article 26 le directeur a discrétion pour déterminer si une enquête doit être tenue et il fonde sa décision sur le rapport prévu à l'article 19 qui lui a été envoyé. L'enquêteur spécial ne peut ajouter de nouveaux motifs durant l'enquête, encore moins modifier les motifs.

L'article 16 stipule que:

- (viii) came into Canada or remains therein with a false or improperly issued passport, visa, medical certificate or other document pertaining to his admission or by reason of any false or misleading information, force, stealth or other fraudulent or improper means, whether exercised or given by himself or by any other person,
  - (ix) returns to or remains in Canada contrary to the provisions of this Act after a deportation order has been made against him or otherwise, or
  - (x) came into Canada as a member of a crew and, without the approval of an immigration officer or beyond the period approved by such officer, remains in Canada after the departure of the vehicle on which he came into Canada."

Then follows Section 19(2):

"19. (2) Every person who is found upon an inquiry duly held by A Special Inquiry Officer to be a person described in subsection (1) is subject to deportation."

Where an arrest is made pursuant to Section 16, therefore, the Special Inquiry Officer has authority to inquire into all the existing facts relevant to these four subsections and no more. They set out the case the subject of the inquiry has to meet. When the Special Inquiry Officer makes a decision to order deportation on one or more of these grounds, and there is an appeal pursuant to Section 11 of the Immigration Appeal Board Act, this Court has jurisdiction to deal with such of the grounds properly inquired into by the Special Inquiry Officer, whether he has based his decision on them or not.

In Brooks v. Minister of Manpower and Immigration (I.A.B. May 7, 1969, unreported) the Board held (at page 6) "The 'lis inter partes' is not ... fixed by the parties to the appeal ... but it is fixed by the statute, the Immigration Appeal Board Act. Once an appeal is filed with the Board, it is seized of all issues properly coming before the Special Inquiry Officer and inquired into by him, regardless of his decision thereon. In other words, in an appeal pursuant to section 11 of the Immigration Appeal Board Act, if a possible ground of deportation is set out in a section 23 report, or section 19 report and direction pursuant to section 26 (of the Immigration Act), and if the Special Inquiry Officer has inquired into this ground, the Board can deal with the matter, and if it so decides render the decision and make the order "that the Special Inquiry Officer who presided at the hearing should have rendered and made", even though the Special Inquiry Officer based his decision on another ground and did not include the further possible ground in the deportation order made by him."

"16. Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, ainsi que tout fonctionnaire à l'immigration, peuvent, sans l'émission d'un mandat, d'une ordonnance ou de directives pour l'arrestation ou la détention, arrêter et détenir aux fins d'enquête ou d'expulsion, ou en vue des deux à la fois, toute personne qui, pour des motifs raisonnables, est soupçonnée d'être une personne mentionnée au sousalinéa (vii), (viii), (ix) ou (x) de l'alinéa e) du paragraphe (1) de l'article 19."

L'article 16 est l'article pertinent de cet appel, attendu que l'appelant a été arrêté conformément à cet article avant la tenue des deux enquêtes à son égard.

L'article 19(1)(e)(vii), (viii), (ix) et (x) stipule que:

"19. (1) Lorsqu'il en a connaissance, le greffier ou secrétaire d'une municipalité au Canada, dans laquelle une personne ci-après décrite réside ou peut se trouver, un fonctionnaire à l'immigration ou un constable ou autre agent de la paix doit envoyer au directeur un rapport écrit, avec des détails complets, concernant

e)toute personne, autre qu'un citoyen canadien ou une personne ayant un domicile canadien, qui

(vii) est entrée au Canada à un endroit autre qu'un port d'entrée ou s'est soustraite à l'examen ou à l'enquête prévue par la présente loi ou s'est évadée d'une garde ou détention légitime visée

par cette loi,

(viii) est entrée au Canada, ou y demeure, avec un passeport, un visa, un certificat médical ou autre document relatif à son admission qui est faux ou irrégulièrement délivré, ou par suite de quelque renseignement faux ou trompeur, par la force, clandestinement ou par des moyens frauduleux ou irréguliers, exercés ou fournis par elle ou par quelque autre personne,

(ix) revient au Canada ou y demeure contrairement aux dispositions de la présente loi après qu'une ordonnance d'expulsion a été rendue

contre elle ou autrement, ou

(x) est entrée au Canada comme membre d'un équipage et, sans l'approbation d'un fonctionnaire à l'immigration ou pendant une période plus longue que celle qu'a approuvée ce fonctionnaire, demeure au Canada après le départ du véhicule sur lequel elle est entrée au Canada."

It will be noted that only the jurisdiction of this Court was at issue in the Brooks case. In that case the respondent specifically requested that a ground of deportation inquired into but rejected by the Special Inquiry Officer, be considered by this Court, and the appellant was given lengthy notice of this request.

This brings us to the crucial problem of how the cause of action is brought before the Court. Clearly, in deportation proceedings the Minister is the "prime mover". It is he, through his officers, who institutes the inquiry, conducts it, and reaches a decision. He is the respondent on an appeal against a deportation order, but, of course, the "cause of action" is still his. Where the grounds of the deportation order incorporate all the grounds inquired into at the inquiry, there is no difficulty, but difficulty arises where, as in the first inquiry in this case, three of the four possible grounds were inquired into but the deportation order was based only on one. There is no doubt that this Court has jurisdiction to deal with the other grounds, if they were properly inquired into, but it will not do this automatically. A recent judgment of the Québec Court of Queen's Bench is of interest: La Cie Miron Ltée v. Corp. de Gaz Naturel du Québec (1970) C.A. 52, where Brossard J.A. said, at page 54:

"Les juges de la Cour d'appel ne sont pas appelés, dans les matières civiles où l'intérêt public n'entre pas en jeu, à se substituer, automatiquement, sans autre motif que celui de l'inscription en appel, au juge de première instance pour apprécier, analyser, disséquer la preuve de faits soumise à celui-ci, pour en peser la force ou la faiblesse et pour en tirer leurs propres conclusions, sans aucunement tenir compte des motifs et des conclusions du premier jugement: devant eux, il ne s'agit pas d'un procès de novo, mais essentiellement d'une revision pour cause, s'il y a lieu, du jugement de première instance. Aussi bien, incombe-t-il à l'appelant de porter spécifiquement à l'attention de la Cour d'appel les motifs sérieux et les causes effectives pouvant justifier une modification du premier jugement sur l'appréciation des faits. L'appelante ne s'est nullement déchargée de ce fardeau."

It follows, therefore, that if the Minister seeks to enforce this whole "cause of action" when the matter comes to appeal, he must ask for it. If he does not, he cannot raise the matter again by another inquiry held subsequent to the decision on the appeal, since his whole cause of action is merged in the judgment of this Court. This is supported not only by the dictum of Middleton J.A. in McIntosh v. Parent, above quoted, but by many other cases of which one of the most frequently cited is Henderson v. Henderson (1843) 3 Hare 100, 67 E.R. 313, where Wrigman, J.C. said:

Ensuite, l'article 19(2) stipule que:

"(2) Quiconque, sur enquête dûment tenue par un enquêteur spécial, est déclaré une personne décrite au paragraphe (1) devient sujet à expulsion."

Lorsqu'une arrestation est effectuée en conformité de l'article 16, l'enquêteur spécial a les pouvoirs d'examiner tous les faits existants qui relèvent de ces quatre paragraphes uniquement. Ils exposent les faits sur lesquels le sujet de l'enquête doit s'expliquer. Quand l'enquêteur spécial établit une ordonnance d'expulsion sur l'un (ou plusieurs) de ces motifs et qu'ensuite il y a appel conformément à l'article 11 de la Loi sur la Commission d'appel de l'immigration, cette cour a la compétence de considérer les motifs régulièrement examinés par l'enquêteur spécial, qu'il ait fondé sa décision sur l'un d'eux ou sur aucun.

Dans l'affaire Brooks c. le ministre de la Main-d'oeuvre et de l'immigration (C.A.I., le 7 mai 1969, non-rapportée) la Commission a déclaré (p. 6):

> "The 'lis inter partes' is not ... fixed by the parties to the appeal ... but it is fixed by the statute, the Immigration Appeal Board Act. Once an appeal is filed with the Board, it is seized of all issues properly coming before the Special Inquiry Officer and inquired into by him, regardless of his decision thereon. In other words, in an appeal pursuant to section 11 of the Immigration Appeal Board Act, if a possible ground of deportation is set out in a section 23 report, or section 19 report and direction pursuant to section 26 ( of the Immigration Act), and if the Special Inquiry Officer has inquired into this ground, the Board can deal with the matter, and if it so decides render the decision and make the order "that the Special Inquiry Officer who presided at the hearing should have rendered and made", even though the Special Inquiry Officer based his decision on another ground and did not include the further possible ground in the deportation order made by him."

Notons que dans l'affaire Brooks le litige portait seulement sur la compétence de cette cour. Dans l'affaire Brooks, l'intimé a demandé qu'un motif particulier de l'ordonnance d'expulsion, motif que l'enquêteur avait refusé d'examiner, soit examiné par la Commission; l'appelant a été amplement avisé de cette demande. "Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Wahl v. Nugent (1924) 2 W.W.R. 1138 (Sask. C.A.) was an action brought against an executrix for a sum of money, alleging that there were lands in the estate from which such money could be realized. A judgment had previously been recovered for the same sum, to be levied out "the goods and chattels" of the deceased. Execution was issued on this judgment and a return of nulla bona testoris was filed. The defence in the second action was res judicata. In the lower court, this doctrine was held not to apply. The appeal from this judgment was allowed: Haultain C.J.S. held, (page 1140):

"While it is true that the statement of claim in the first action did not make all the allegations necessary to disclose a cause of action, the case was fought out as if it had, and on the same evidence practically as was used in the present action. The cause of action was the same and if the action failed, it failed not through any defect in the statement of claim but for lack of proof of an important fact which was a condition precedent necessary to be shown to exist. The statement of defence in the first action distinctly put the question of devastavit in issue by alleging that Patrick F. Nugent in his lifetime fully administered all the assets of J.P. O'Connor in Saskatchewan which ever came into his hands and "did not waste or devastate any of the property of said J.P. O'Connor in any way." No new facts have arisen since the first action was tried. If there was a devastavit the evidence necessary to prove it was available at the time. If any cause of action existed it was in existence at the time the first action was brought."

McKay J.A., in the course of his judgment, cited Henderson V. Henderson (supra) and held that the principles there enunciated applied to the case before him. He continued (at page 1143): "The following

Ceci nous amène au problème crucial: comment la cause d'une action en justice est apportée devant la cour? Sans aucun doute, à l'occasion des procédures suivies lors de l'expulsion, l'initiative revient au Ministre. C'est lui qui, par l'intermédiaire de ses agents, ouvre l'enquête, la tient, et la ferme. En appel d'une ordonnance d'expulsion, il est l'intimé, mais bien sûr il "cause" encore l'action en justice. Lorsque l'ordonnance d'expulsion comprend tous les motifs examinés à l'enquête, il n'y a pas de difficulté; l'affaire se complique quand - ainsi que lors de la première enquête dans cette affaire l'enquêteur spécial examine trois des quatre motifs susceptibles d'être valides alors que l'ordonnance d'expulsion ne se fonde que sur un seul motif. Sans aucun doute, la cour a compétence pour étudier les autres motifs, afin de déterminer s'ils ont été régulièrement examinés; mais cette pratique n'est pas systématique. Un récent jugement du Banc de la Reine de la Cour du Québec intéresse notre propos: la Cie Miron Ltée c. Corp. de Gaz Naturel du Québec (1970) C.A. 52, à la page 54 le juge Brossard a déclaré:

> "Les juges de la Cour d'appel ne sont pas appelés, dans les matières civiles où l'intérêt public n'entre pas en jeu, à se substituer, automatiquement, sans autre motif que celui de l'inscription en appel, au juge de première instance pour apprécier, analyser, disséquer la preuve de faits soumise à celui-ci, pour en peser la force ou la faiblesse et pour en tirer leurs propres conclusions, sans aucunement tenir compte des motifs et des conclusions du premier jugement: devant eux, il ne s'agit pas d'un procès de novo, mais essentiellement d'une revision pour cause, s'il y a lieu, du jugement de première instance. Aussi bien, incombe-t-il à l'appelant de porter spécifiquement à l'attention de la Cour d'appel les motifs sérieux et les causes effectives pouvant justifier une modification du premier jugement sur l'appréciation des faits. L'appelante ne s'est nullement déchargée de ce fardeau."

Il s'ensuit que si le Ministre cherche à appliquer l'ensemble de la cause de l'action en justice quand l'affaire est en appel, il doit le demander. Sinon il ne peut à nouveau soulever l'affaire en faisant tenir une autre enquête puisque l'ensemble de la cause de l'action est novée par le jugement rendu par la cour. Non seulement l'obiter du juge Middleton dans l'affaire McIntosh c. Parent, citée ci-dessus appuie ce point de vue, mais aussi de nombreuses autres précédents le font, et parmi ceux-ci un des plus fréquemment cité est Henderson c. Henderson (1843) 3 Hare 100, 67 E.R. 313, où le juge Wrigman a déclaré:

observations by Lush, J. in Ord v. Ord (1923) 2 K.B. 432, 92 L.J.K.B. 859, are also applicable to the case at bar." At page 862: "There is a wider principle which I will refer to in a moment which is often treated as covered by the plea of res judicata, which prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with res judicata in its strict sense."

And at page 864:

"The other, the wider principle to which I have referred and which is often treated as falling within the plea of res judicata in this: the maxim Nemo debet bis vexari prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deal with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been."

In Wahl v. Nugent (supra) (1924) 2 W.W.R., McKay, J.A. held, (Page 1144):

"...The plaintiff failed to prove devastavit in the first action, and he brings the present action with the intention of again endeavouring to prove what he failed to prove in the first action with evidence that he could have produced in the first action had he been so minded. Under these circumstances of the trial and result of the first action against defendant and on the above-mentioned authorities I am of the opinion with deference to the learned trial Judge that the plea of res judicata in the present action is cstablished ..."

In Fenerty v. City of Halifax, (1920) 50 D.L.R. 435, (N.S.S.C.) the plaintiff had brought action in 1910 against the City of Halifax, alleging wrongful obstruction of a stream - Judgment was in favour of the city. The second action was brought for obstruction of the same stream, in the same manner, but in respect of a subsequent year. The plaintiff failed, on the ground that the identical questions were raised in the second action as those in the first. Longley J. Said, at page 435:

"Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Dans l'affaire Wahl c. Nugent (1924) 2 W.W.R. 1138 (Sask. C.A.) une action a été intentée contre un exécuteur testamentaire pour une somme d'argent, en alléguant que la succession comprenait des terres aptes à procurer un bénéfice. Auparavant, un jugement avait ordonné que la dite somme d'argent soit prélevée des biens meubles de l'auteur du testament. L'exécution du jugement eut lieu et un mandat de nulla bona testoris fut déposé. Dans la seconde action la défense portait sur la doctrine de chose jugée (res judicata). Un tribunal inférieur a maintenu que cette doctrine ne s'appliquait pas à l'affaire. L'appel de ce jugement a été accueilli: Haultain C.J.S. a déclaré (page 1140):

"While it is true that the statement of claim in the first action did not make all the allegations necessary to disclose a cause of action, the case was fought out as if it had, and on the same evidence practically as was used in the present action. The cause of action was the same and if the action failed, it failed not through any defect in the statement of claim but for lack of proof of an important fact which was a condition precedent necessary to be shown to exist. The statement of defence in the first action distinctly put the question of devastavit in issue by alleging that Patrick F. Nugent in his lifetime fully administered all the assets of J.P. O'Connor in Saskatchewan which ever came into his hands and "did not waste or devastate any of the property of said J.P. O'Connor in any way." No new facts have arisen since the first action was tried. If there was a devastavit the evidence necessary to prove it was available at the time. If any cause of action existed it was in existence at the time the first action was brought."

"In order to maintain a case of this character it is necessary to shew some real substantial difference between the present action and the one which has already been disposed of, and it is necessary to shew furthermore that things exist at the present time which did not exist then; and if conditions existed then which would have enabled him to succeed on that action, they should have been pleaded and he should not be able to bring them up now."

Ritchie, E.J. expressed the same concept (page 438):

"... The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, and not as to the matters dealt with, but also as to questions which the parties had an opportunity of raising."

In Maynard v. Maynard (1951) S.C.R. 347, the court found as a fact that the appeal before it was from a judgment on a second action for substantially the same relief claimed and adjudicated in a prior action.

In the course of his judgment Cartwright, J. (as he then was) said (page 358):

"... It may be that some of the points of law argued before us were not thought of at that time. All this, however, would, it seems to me, be nihil ad rem. The issue now before us was, I think, expressly raised in the pleadings in the earlier proceeding and was decided by the judgment of MacKay J., dismissing that action. The appellant has submitted the same question as is now before us (although perhaps not the same arguments) to the decision of a Court of competent jurisdiction and cannot now re-litigate the matter."

He then quoted the passage from Henderson v. Henderson, already reproduced above, and also quoted the following passage from Hoystead v. Commissioner of Taxation (1926) A.C. 155 (at page 170):

"Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."

Lors du jugement le juge McKay cita Henderson c. Henderson (supra) et déclara que les principes qui y sont énoncés s'appliquaient à l'affaire amenée devant lui. Il poursuivit (page 1143):

"The following observations by Lush, J. in Ord v Ord (1923) 2 K.B. 432, 92 L.J.K.B. 859, are also applicable to the case at bar." At page 862:
"There is a wider principle which I will refer to in a moment which is often treated as covered by the plea of res judicata, which prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with res judicata in its strict sense."

## et à la page 864:

"The other, the wider principle to which I have referred and which is often treated as falling within the plea of res judicata is this: the maxim Nemo debet bis vexari prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deal with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But is is, by reason of the principle I have stated, treated as if it had been."

Dans l'affaire Wahl c. Nugent (supra) (1924) 2 W.R.R. le juge McKay a déclaré (page 1144):

"...The plaintiff failed to prove devastavit in the first action, and he brings the present action with the intention of again endeavouring to prove what he failed to prove in the first action with evidence that he could have produced in the first action had he been so minded. Under these circumstances of the trial and result of the first action against defendant and on the above-mentioned authorities I am of the opinion with deference to the learned trial Judge that the plea of res judicata in the present action is established ..."

He continued:

"In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact."

In Churchill v. McRae, (1915) 8 W.W.R. 394 (Sask. S.C.) the headnote accurately gives the facts:

"C. sold to M. land and certain chattels thereon for a lump sum payable by instalments. Upon default C. obtained an order cancelling M.'s interest in the land and forfeiting moneys paid under the agreement, no mention being made of the chattels. M. refused to give up the chattels and C. took an action for their recovery."

The Court dismissed the claim for chattels on the ground that the matter was res judicata, basing its decision on Henderson v. Henderson (supra). Brown, J. stated (at page 396): "If the plaintiff had wanted recovery of the chattels ... he should have asked for same in his original action ... Not having asked for this relief in that action he cannot get it now ..." It may be stated that it would have been more accurate to describe this principle - which is undoubtedly settled law - as falling within the doctrine of merger rather than that of res judicata.

It is of interest to note that the doctrine of merger seems to be unknown in the continental French legal system - though res judicata, as will be seen, is a well established principle. It would appear, however, that there is a possibility that the doctrine has been grafted on to the civil law as applied in the Province of Québec. In Nadeau and Ducharme's Traité de Droit civil du Québec, volume 9, we find at page 483:

"Il ne faut pas que les causes servant de fondement aux droits réclamés et que l'on invoque successivement s'excluent les unes des autres, soient incompatibles (202). Cependant, dans les actions en nullité, des causes de même nature peuvent-elles être invoquées successivement? Nous ne le croyons pas. Un contrat est annulable pour vices de consentement consistant, disons, dans le dol et l'erreur. Est-il possible après le rejet d'une action en annulation du contrat pour motif de dol, d'en intenter une seconde fondée cette fois sur l'erreur ayant aussi entaché le consentement? Langelier répond dans l'affirmative (203) mais nous pensons que la solution contraire est préférable. On ne peut diviser ainsi ses recours pour, en somme, faire valoir la même cause juridique, qui est le vice du consentement. Ne peut-on, de plus, invoquer la disposition contenue à l'art. 87 C. proc. civ.? De semblable façon, un défendeur est tenu de produire dans sa défense tous les moyens qu'il a pour repousser l'action, car, faute de le faire, le jugement qui le condamne décide implicitement qu'il n'en a aucun

Dans l'affaire Fenerty c. City of Halifax, (1920) 50 D.L.R. 435, (N.S.S.C.) en 1910 le plaignant a intenté une action contre la ville d'Halifax; il a prétendu que la ville a illégalement et sans droit gêné le cours d'un ruisseau - les juges se sont prononcés en faveur de la ville. Une seconde action a été intenté pour le même motif, et de la même façon, mais en rapport avec une année subséquente. Le plaignant a perdu son procès, car lors de la seconde action le point en litige était identique à celui que les juges ont tranché lors de la première action. Le juge Longley a déclaré (p. 435):

"In order to maintain a case of this character it is necessary to shew some real substantial difference between the present action and the one which has already been disposed of, and it is necessary to shew furthermore that things exist at the present time which did not exist then; and if conditions existed then which would have enabled him to succeed on that action, they should have been pleaded and he should not be able to bring them up now."

Ritchie E.J. a adopté le même principe (page 438):

"...The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, and not as to the matters dealt with, but also as to questions which the parties had an opportunity of raising."

Dans l'affaire Maynard c. Maynard (1951) R.C.S. 347, la cour a déclaré, qu'en fait, l'appel devant elle était à l'encontre d'un jugement rendu lors d'une seconde action intentée pour des conclusions à peu près identiques à celles réclamées et adjugées lors d'une première action.

Durant son jugement M. le juge Cartwright, tel qu'il était alors, a déclaré (page 358):

"...It may be that some of the points of law argued before us were not thought of at that time. All this, however, would, it seems to me, be nihil ad rem. The issue now before us was, I think, expressly raised in the pleadings in the earlier proceeding and was decided by the judgment of MacKay J., dismissing that action. The appellant has submitted the same question as is now before us (although perhaps not the same arguments) to the decision of a Court of competent jurisdiction and cannot now re-litigate the matter."

pouvant le libérer (204). La solution devrait être la même, selon nous, pour les actions fondées sur un quasidélit. Nous ne saurions souscrire à la thèse de la jurisprudence française qui permet à la victime d'un accident dont la demande d'indemnité, fondée sur une faute, a été rejetée, de la renouveler en invoquant une présomption de responsabilité (204a). Il y a ici une cause unique qui est la faute civile, qu'elle soit présumée ou à prouver. La présomption de faute ne sert qu'à faciliter les choses à la victime dans sa recherche d'une responsabilité du défendeur. Elle n'a qu'à invoquer simultanément, l'un à titre subsidiaire, ces deux moyens de parvenir à ses fins. Toute solution contraire est un encouragement à la multiplication des litiges."

In Phipson on Evidence, Ed. 10, page 1366, the learned author states:

"The parties are also, in general estopped as to their whole case, and will not be permitted to reopen the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident omitted a part of their case. Thus, they may not split their cause of action, nor their relief, nor set up facts which were available for them under any of the issues tried in the former action. And if all matters in difference are referred, this is an estoppel as to every claim falling within the scope of the reference, though not as to others outside it.

But plaintiffs are not bound, nor estopped if they fail, to join distinct causes of action though arising in respect of the same transaction, nor distinct equities entitling to the same relief, but the fact that in previous litigation the facts upon which the plaintiff now relies were decided against him may be material to the issue whether a subsequent action should be struck out as frivolous. Nor formerly were defendants obliged to litigate all or any of their defences in a particular suit, though, under the Judicature Acts, this rule has now to some extent been modified. And no estoppel arises if the parties had no opportunity of obtaining in the former suit the relief sought in the latter, nor if the question raised in the second action was not, and could not properly have been, decided in the former suit; nor if, though in fact raised and decided, it was unnecessary to the decision."

Ensuite il a cité le passage tiré de l'affaire Henderson c. Henderson (supra), puis il a mentionné l'affaire Hoystead c. Commissioner of Taxation (1924) A.C. 155 et en particulier le passage suivant:

> "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."

## Il a poursuivi:

"In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact."

Dans l'affaire Churchill c. McRae (1915) 8 W.W.R. 394 (C.S. Sask.) le résumé présente correctement les faits:

> "C. sold to M. land and certain chattels thereon for a lump sum payable by instalments. Upon default C. obtained an order cancelling M.'s interest in the land and forfeiting moneys paid under the agreement, no mention being made of the chattels. M. refused to give up the chattels and C. took an action for their recovery."

La cour a rejeté la prétention aux biens en déclarant que l'affaire était chose jugée (res judicata); elle a fondé sa décision sur l'affaire Henderson c. Henderson (supra). Le juge Brown a déclaré (page 396):

> "If the plaintiff had wanted recovery of the chattels ... he should have asked for same in his original action ... Not having asked for this relief in that action he cannot get

it now ...

Turning to the facts of the instant appeal, Mr. Yeung was arrested pursuant to Section 16 of the Immigration Act. The frame of reference of the inquiry following this arrest, on October 9, 1969 (which resulted in the first deportation order) empowered the Special Inquiry Officer to inquire whether the subject was a person described in Section 19(1)(e)(vii), (viii), (ix) and (x) of the Immigration Act, and he did. When the matter came on for appeal, this Court had jurisdiction, pursuant to Section 14(c) of the Immigration Appeal Board Act, to make the order the Special Inquiry Officer should have made. It found that the one ground used, i.e. Section 19(1)(e)(x) was not proved, but it could have ordered deportation, on the evidence adduced at the inquiry, pursuant to Section 19(1)(e)(vii) and possibly Section 19(1)(e)(viii). In the Minister's written submissions, under signature of D. Bandy, filed with the Board on October 27, 1969, arguments were submitted under the head "Legality of the Deportation Order". These relate solely to Section 19(1)(e)(x). However, under the head "Considerations under Section 15(1)(b) of the Immigration Appeal Board Act" the respondent drew the Board's attention to the fact that the "appellant's desertion was a deliberate attempt to circumvent Canada's Immigration Laws", and quoted that portion of the evidence relating to the appellant's failure to report to an immigration officer. This evidence would clearly support a finding that the appellant was a person described in Section 19(1)(e)(vii) although the respondent never mentioned that subsection in his submissions. Can this be said to be an adequate request to the Court to make the order pursuant to Section 14(c) of the Immigration Appeal Board Act - that the Special Inquiry Officer should have made? The answer to this question must be no. It is not the intention, or the desire of this Court to become mired in a morass of legal and procedural technicalities, but certain fundamental procedures must be observed, and one of these is that the parties state their case with sufficient clarity and particularity as to be understood not only by the Court but by their opponent.

This brings us to a third, and fundamental, condition precedent to the Court's exercise of its jurisdiction under Section 14(c) of the Immigration Appeal Board Act: adequate notice to the appellant, by the respondent, of its request to the Board to exercise such jurisdiction. The appellant must know the case he has to meet on his appeal. He, of course, is simply appealing from the order of deportation as it stands, and Section 19(2) of the Immigration Appeal Board Act provides: "Every appellant under Section 11 ... shall be advised by the Minister of the grounds on which the deportation order was made ..." This section, however, does not excuse the Minister from failing to give notice where new grounds are sought to be added at the appeal stage - to hold otherwise would result in a denial of natural justice.

On peut dire qu'il aurait été plus exacte de déclarer que ce principe sans aucun doute défini par la Loi relève de la novation par jugement (merger) plutôt que de celle de la chose jugée (res judicata).

Notons que le système juridique français semble ignorer comme telle la doctrine de "merger" - alors que la doctrine de chose jugée (res judicata), comme nous le verrons, est une doctrine bien établie. Il apparaîtrait, cependant, que cette doctrine ait été introduite dans le code civil appliqué dans la Province de Québec. Nous trouvons dans le Traité de Droit civil du Québec de Nadeau et Ducharme (volume 9 p. 483):

"Il ne faut pas que les causes servant de fondement aux droits réclamés et que l'on invoque successivement s'excluent les unes des autres, soient incompatibles (202). Cependant, dans les actions en nullité, des causes de même nature peuvent-elles être invoquées successivement? Nous ne le croyons pas. Un contrat est annulable pour vices de consentement consistant, disons, dans le dol et l'erreur. Est-il possible après le rejet d'une action en annulation du contrat pour motif de dol, d'en intenter une seconde fondée cette fois sur l'erreur ayant aussi entaché le consentement? Langelier répond dans l'affirmative (203), mais nous pensons que la solution contraire est préférable. On ne peut diviser ainsi ses recours pour, en somme, faire valoir la même cause juridique, qui est le vice du consentement. Ne peut-on, de plus, invoquer la disposition contenue à l'art. 87 C. proc. civ.? De semblable façon, un défendeur est tenu de produire dans sa défense tous les moyens qu'il a pour repousser l'action, car, faute de le faire, le jugement qui le condamne décide implicitement qu'il n'en a aucun pouvant le libérer (204). La solution devrait être la même, selon nous, pour les actions fondées sur un quasi-délit. Nous ne saurions souscrire à la thèse de la jurisprudence française qui permet à la victime d'un accident dont la demande d'indemnité, fondée sur une faute, a été rejetée, de la renouveler en invoquant une présomption de responsabilité (204a). Il y a ici une cause unique qui est la faute civile, qu'elle soit présumée ou à prouver. La présomption de faute ne sert qu'à faciliter les choses à la victime dans sa recherche d'une responsabilité du défendeur. Elle n'a qu'à invoquer simultanément, l'un à titre subsidiaire, ces deux moyens de parvenir à ses fins. Toute solution contraire est un encouragement à la multiplication des litiges."

 $<sup>\,</sup>$  M. Phipson dans son ouvrage On Evidence, Ed. 10, page 1366 déclare:

Even if it be held that the written submission of the Minister, filed October 27, 1969 was a comprehensible request to add in a new ground of deportation based on Section 19(1)(e)(vii) of the Act, there is no evidence that any notice thereof was ever given to the appellant. A copy of the submission was forwarded to the appellant by the Acting Registrar of the Board on the same day, but after the appeal was heard. So far as is known, the respondent never furnished him with a copy.

Because of the nature of its jurisdiction, the Rules of the Board provide only for pleadings of a very rudimentary nature. There is, however, provision in Rule 4(5) for a "Reply" by the respondent, which, pursuant to R. 4(6) must be served on the appellant by the Registrar. The reply to the first appeal of Mr. Yeung was filed with the Board October 17, 1969, and the material part thereof simply states: "I hereby reply to the Notice of Appeal of the appellant ... on the following grounds: that the deportation order of Special Inquiry Officer A.E. Brooks, dated October 9, 1969, is in accordance with the law." Had the respondent sought to add in new grounds to the existing order of deportation, it could have so indicated in its reply, thus advising both the appellant and the Court of its intention.

Since two of the three conditions precedent to the proper bringing of the "cause of action" before the Court, namely a full inquiry into all possible grounds, a request to the Court, and adequate notice of the request to the appellant, were missing in the first appeal, the respondent is estopped from endeavouring to deport the appellant a second time on the same grounds based on the same evidence. Its remedies have merged in the judgment of the Board in respect of the first appeal, rendered October 28, 1969.

One further problem remains: do the doctrines of res judicata and merger by judgment apply to Immigration appeals? It must be said at once that the decision of a Special Inquiry Officer where there is no question of an appeal is not res judicata. Section 29 of the Immigration Act provides:

"29. An inquiry may be reopened by a Special Inquiry Officer for the hearing and receiving of any additional evidence or testimony and a Special Inquiry Officer has authority, after hearing such additional evidence or testimony, to confirm, amend or reverse the decision previously rendered."

This clearly precludes the operation of the doctrine, as between two or more decisions by a Special Inquiry Officer between the same parties, if there is no question of an appeal. This section was incorporated in the Immigration Act long before there was any provision for an appeal to a Court of law. It appears in substantially the same form as

"The parties are also, in general estopped as to their whole case, and will not be permitted to reopen the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident omitted a part of their case. Thus, they may not split their cause of action, nor their relief, nor set up facts which were available for them under any of the issues tried in the former action. And if all matters in difference are referred, this is an estoppel as to every claim falling within the scope of the reference, though not as to others outside it.

But plaintiffs are not bound, nor estopped if they fail, to join distinct causes of action though arising in respect of the same transaction, nor distinct equities entitling to the same relief, but the fact that in previous litigation the facts upon which the plaintiff now relies were decided against him may be material to the issue whether a subsequent action should be struck out as frivolous. Nor formerly were defendants obliged to litigate all or any of their defences in a particular suit, though, under the Judicature Acts, this rule has now to some extent been modified. And no estoppel arises if the parties had no opportunity of obtaining in the former suit the relief sought in the latter, nor if the question raised in the second action was not, and could not properly have been, decided in the former suit; nor if, though in fact raised and decided, it was unnecessary to the decision."

A présent regardons les faits pertinents de cet appel.

M. Yeung a été arrêté en vertu de l'article 16 de la Loi sur l'immigration. Le contexte de l'enquête qui a suivi l'arrestation du 9 octobre 1969 (laquelle a amené la première ordonnance d'expulsion) demandait que l'enquêteur spécial examine si le sujet était une personne décrite à l'article 19(1)(e)(vii), (viii), (ix) et (x) de la Loi sur l'immigration et c'est ce qu'il a fait. Quand l'affaire est venue devant notre cour, celle-ci en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration est compétente de rendre l'ordonnance d'expulsion que l'enquête spécial aurait dû établir. La Commission a déclaré que le motif fondé sur l'article 19(1)(e)(x) n'a pas été prouvé; par contre, d'après la preuve administrée à l'enquête, l'expulsion aurait pu être ordonnée en se fondant sur l'article 19(1)(e)(vii) et vraisemblablement sur l'article 19(1)(e)(viii). Le Ministre, dans sa

Section 16(2) of the consolidation of the Act published in 1937, when there was provision for an appeal to the Minister. The present section is found in the Immigration Act of 1952 which is, subject to amendments made by the Immigration Appeal Board Act in 1967 and to certain other inconsequential amendments, the present Act. In the 1952 Act, there was provision for appeal to the former Immigration Appeal Board (an administrative Board forming part of the Department of Citizenship and Immigration, as it then was), with a review by the Minister of the decisions of that Board.

The concept of an appeal to a Court of law did not arise until the Immigration Appeal Board Act was passed in 1967.

The Immigration Appeal Board is by the clear terms of the statute creating it, a Court of record, with "all such powers, rights and privileges as are vested in a superior Court of record" (Section 7(2), Immigration Appeal Board Act) and having "sole and exclusive jurisdiction to hear and determine all questions of act and law ... that may arise in relation to the making of an order of deportation ..." (Section 22).

Its decisions made pursuant to Section 14 of the Act are final. In other words, within the ambit of its jurisdiction, it is a Court of appeal and the doctrine of res judicata as formulated in Kingston's case applies to its decisions. Spencer-Bower sets out the doctrine thus:

"... where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, ..." (Res Judicata, Spencer Bower & Turner, 1969, page 9).

It may further be added that the doctrine of res judicata is an extremely ancient judicial concept, which is to be found in Roman Law, which was well developed in English law by the 16th century, and which is to be found in the Code Napoléon in terms not dissimilar to those familiar to students of the Common law:

plaidoirie écrite, signée par M. D. Bandy et déposée le 27 octobre 1969 auprès de la Commission, présente des arguments sous le titre "legality of the Deportation Order". Ceux-ci ont trait exclusivement à l'article 19(1)(e)(x). Cependant, sous le titre "Considerations under Section 15(1)(b) de la Loi sur la Commission d'appel de l'immigration" l'intimé a fait remarquer à la Commission qu'en fait "(the) appellant's desertion was a deliberate attempt to circumvent Canada's Immigration Laws" et il a cité une partie de la preuve qui montre que l'appelant a omis de se présenter devant un fonctionnaire à l'immigration. D'après la preuve on pourrait aisément déclarer que l'appelant était une personne décrite à l'article 19(1)(e)(xii) toutefois l'intimé n'a jamais mentionné ce paragraphe dans ses plaidoiries. Peut-on tenir ceci pour une demande adéquate présentée à la Court à l'effet que la Cour rende l'ordonnance (en vertu de l'article 14(c) de la Loi sur la Commission d'appel) que l'enquêteur spécial aurait dûe établir? Nous devons répondre pour la négative à cette question. Il n'est ni de l'intention ni du désir de la cour de s'embourber dans la fondrière des techniques du droit et de la procédure; par contre elle doit observer certains principes fondamentaux de procédure et l'un d'eux est: les parties doivent exposer leur cas avec assez de clarté et de détails afin d'être comprises non seulement par la cour mais aussi par la partie adverse.

Ceci nous amène à une troisième condition fondamentale préliminaire à l'exercice de la compétence de la Commission aux termes de l'article 14(c) de la Loi sur la Commission d'appel de l'immigration; l'intimé doit convenablement aviser l'appelant de son intention de demander que la Commission exerce cette compétence. L'appelant doit connaître les points auxquels il devra répondre durant l'appel. Bien sûr, il appelle simplement de l'ordonnance d'expulsion telle que présentée, mais l'article 19(2) de la Loi sur la Commission d'appel stipule que: Chaque appelant en vertu de l'article 11 ... doit être avisé par le Ministre des motifs sur lesquels se fonde l'ordonnance d'expulsion..." Cet article, cependant, n'excuse pas le défaut de donner avis quand durant l'appel, le Ministre cherche à introduire des nouveaux motifs; soutenir le point de vue contraire amènerait un déni de justice naturelle.

Même si l'on soutient que la plaidoirie écrite du Ministre déposée le 27 octobre 1969 constituait une demande manifeste d'ajouter un nouveau motif à l'ordonnance d'expulsion fondé sur l'article 19(1)(e)(vii) de la Loi, il n'existe aucune preuve à l'effet qu'un avis de ce changement ait été donné à l'appelant. Le 27 octobre 1969 le greffier intérimaire a envoyé à l'appelant une copie de la plaidoirie mais la Cour avait déjà entendu l'appel. En autant que nous sachions, l'intimé n'a jamais fourni de copie de la plaidoirie à l'appelant.

"L'autorité de la chose jugée n'a lieu qu'à égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause, que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."

A similar provision is to be found in article 1241 of the Québec Civil Code. According to the learned authors of Traité de Droit civil du Québec, MM. Nadeau and Ducharme, the concept of "chose jugée" in French Canada goes back at least to the ordonnance of 1629.

This ancient concept is therefore to be found in both systems of law prevailing in Canada, and is, of course, fundamental both to the proper administration of justice and justice itself: interest rei publicae ut sit finis litum, and nemo debit bis vexari pro eadem causa.

A direct statutory provision, and not merely the existence of Section 29 of the Immigration Act, would be required to abrogate the operation of this fundamental doctrine in relation to the decisions of the Immigration Appeal Board.

Brief mention must be made of Section 28(4) of the Act, which provides:

"28. (4) No decision rendered under this section shall prevent the holding of a future inquiry if required by reason of a subsequent report under Section 19 or pursuant to Section 25."

It will be recalled that both inquiries held in respect of Mr. Yeung were held pursuant to Section 25 of the Act, since he had been arrested pursuant to Section 16. A careful reading of Section 28(4), however, leads to the conclusion that it refers to the holding of a "future inquiry" in respect of a factual situation which arises subsequent to the first inquiry, and decision; in other words it is (as far as it goes) simply a codification of the common law relating to res judicata.

Finally, reference may be made to Connelly v. Director of Public Prosecutions (1964) A.C. 1254 (H.L.), which dealt with the related doctrine of autrefois acquit. The learned editor of Spencer-Bower comments (at page 282):

"In Connelly v. Director of Public Prosecutions it was argued on behalf of the appellant that, even if a plea of autrefois acquit was not strictly tenable, the discretion of the Court should have been exercised to stay the second proceedings as unfair and unjust.

A cause de la nature de sa juridiction, les règles de la Commission ne s'appliquent qu'en matière de plaidoyers de nature très simple. Par contre, la Règle 4(5) prévoit une "Réponse" fournie par l'intimé, laquelle en vertu de la Règle 4(6) doit être transmise par le greffier à l'appelant. Le 17 octobre 1969 la réponse au premier appel de M. Yeung a été déposée auprès de la Commission et déclare simplement: "I hereby reply to the Notice of Appeal of the appellant ... on the following grounds: that the deportation order of Special Inquiry Officer A.E. Brooks, dated October 9, 1969, is in accordance with the law." Si l'intimé avait cherché à introduire de nouveaux motifs dans l'ordonnance d'expulsion établie, il aurait pu le faire en les indiquant dans sa réponse; ainsi il aurait prévenu l'appelant et la cour de son intention.

Trois conditions précèdent l'administration régulière de la "cause de l'action" devant la cour: une enquête entière sur tous les motifs possibles, une demande présentée à la cour, un avis de la requête fourni à l'appelant. Attendu que dans le premier appel seulement une condition est présente, l'intimé ne peut donc pas de nouveau chercher à expulser l'appelant pour les mêmes motifs fondés sur la même preuve. Ses recours sont novés dans le jugement rendu le 28 octobre 1969 à l'occasion du premier appel.

A présent nous devons répondre à une autre question: les doctrines de chose jugée (res judicata) et de novation par voie de jugement (merger by judgment) s'appliquent-elles aux appels de l'immigration? En premier lieu, nous disons que lorsqu'il n'y a pas d'appel de la décision rendue par l'enquêteur spécial, il n'y a pas chose jugée (res judicata). L'article 29 de la Loi sur l'immigration stipule que:

"29. Une enquête peut être ouverte par un enquêteur spécial pour l'audition et la réception de quelque preuve ou témoignage supplémentaire, et un enquêteur spécial a le pouvoir, après avoir entendu cette preuve ou ce témoignage supplémentaire, de confirmer, modifier ou révoquer la décision antérieurement rendue."

Il est manifeste que, s'il n'est pas question d'appel, l'article 29 empêche l'application de la doctrine à deux décisions ou plus rendues par l'enquêteur spécial entre les mêmes parties. Cet article a été inclus dans la Loi bien avant que celle-ci ne prévoit de dispositions pour les appels devant une cour de justice. Quant à la forme, cet article est en substance amalogue à celle de l'article 16(2) de la Loi sur l'immigration de 1937, qui prévoyait un appel auprès du Ministre. Le présent article se trouve dans la Loi sur l'immigration de 1952 qui est la Loi actuellement en vigueur, bien qu'elle ait été sujette à révision par la Loi sur la Commission d'appel de 1967 et à d'autres modifications mineures. La Loi de 1952 prévoyait un droit d'appel devant la Commission d'appel de l'immigration (une

This plea did not commend itself on the merits of their Lordships, who saw nothing unfair to the appellant, on the facts in that particular case, in his being charged with robbery when his acquittal on the earlier charge of murder was due to what might be described as a technical accident. But the question of whether there was a discretion, which the court in a more meritorious case might have exercised, is one on which their Lordships found themselves in some difference. Lord Devlin and Lord Pearce were clearly of the opinion that the Court would have a wide inherent discretion to stay proceedings where these were demonstrated to be unfair to the accused. Lord Reid agreed that there must be a discretion in the case of "anything that savours of abuse of process". Lord Morris on the other hand (and Lord Hodson agreed with him) thought that it was of little help to inquire (in some vague and imprecise way" whether the second prosecution was "unfair"; and they felt that the only test must be (as perhaps was implicit too in Lord Reid's speech) whether the prescribed practice had been followed on presenting the indictment.

"I consider (Lord Morris said) that if a charge is preferred which is contained in a perfectly valid indictment which is so drawn as to accord with what the court has stated to be current practice, and which is presented to a court clothed with jurisdiction to deal with it, and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed."

In view of the division between their Lordships, and in view of the fact that the point does not appear to have been one necessary for the ultimate decision to which the House came, the exercise of the inherent discretion of the Court may perhaps be regarded as a matter still capable of some discussion in a case in which it is crucial. But the extent of the division between their Lordships may not be as great as might at first appear. All appear to have agreed that, as Lord Pearce said "the court has an inherent power to protect its process from abuse"; the question on which they differed was whether such a discretion would enable a judge, confronted with an indictment drawn in accordance with prescribed practice, charging

Commission administrative rattachée à ce qui était alors le Ministère de la Citoyenneté et de l'Immigration) et accordait au Ministre le droit de réviser la décision de la Commission.

Il faut attendre l'adoption de la Loi sur la Commission d'appel de 1967 pour voir l'apparition du concept d'appel devant une cour de justice.

Par les termes mêmes de la Loi qui l'a créée, la Commission d'appel de l'immigration est une cour d'archives avec tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives (article 7(2) de la Loi sur la Commission d'appel de l'immigration); elle a compétence exclusive pour entendre et décider toutes les questions de fait ou de droit ... qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion..." (article 22)

Ses décisions rendues conformément à l'article 14 de la Loi sont sans appel. En d'autres termes, à l'intérieur des limites de sa juridiction, elle est cour d'appel et la doctrine de chose jugée (res judicata) telle que définie dans l'affaire Kingston s'applique à ses décisions:

Spencer-Bower énonce l'état de la doctrine de cette façon:

"...where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, ..." (Res Judicata, Spencer Bower & Turner, 1969, page 9).

On peut ajouter que la doctrine de chose jugée (res judicata) constitue une notion de droit très ancienne; on la retrouve dans le Droit Romain, dans le Droit Anglo-Saxon qui, vers le l6ième siècle, le développe sensiblement, et aussi dans le Code Napoléon qui le définit en des termes qui ne sont pas très différents de ceux qu'utiliseraient les personnes initiées à la Common Law:

"L'autorité de la chose jugée n'a lieu qu'à égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause, que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."

a crime to which autrefois acquit could not validly be pleaded, and presented by a prosecutor insisting on his right to proceed, to order that the proceedings should be stayed. The view of Lord Morris and of Lord Hodson was that the courts being at that stage bound by the rule in R. v. Jones, the first indictment was perfectly regular, and in accordance with the practice actually prescribed by the Court of Criminal Appeal; and the second likewise. No rule of practice therefore having been infringed by either indictment, it was not to be said "in some vague and imprecise way" to have been unfair that appellant should not have been tried on the second indictment. But Lord Morris and Lord Hodson did not go so far as to say that they would not use the inherent power of the court if in a future case it is found that the plea of an accused has been stultified by the failure of a prosecutor to include all proper charges in the former indictment, contrary to directions given in Connelly's case. It is therefore rather to the exercise than to the existence of the discretion that their Lordships are ultimately seen to have been in some difference."

In the instance case, if the doctrine of merger did not apply, this court would exercise its inherent jurisdiction to find that the second inquiry, and consequent appeal of Mr. Yeung, unfair and unjust, and an abuse of process.

For the above reasons, the appeal from the order of deportation of November 5, 1969, is allowed.

Dated at Ottawa, this 8th day of July 1970.

Concurred in by: Jean-Pierre Houle and J.A. Byrne.

For the appellant: nil

For the respondent: A.S. Vass, Esq.

L'article 1241 du Code civil du Québec prévoit une disposition analogue. Selon les savants auteurs du Traité de Droit civil du Québec, M. le juge Nadeau et Me Ducharme, le concept de "chose jugée" au Québec, remonte au moins à l'ordonnance de 1629.

Cet ancien concept a donc cours dans les deux systèmes de justice qui prévalent au Canada; il est, naturellement, fondamental tant pour l'administration régulière de la justice, que pour la justice en elle-même: interest rei publicae ut sit finis litum, et nemo debit bis vexari pro eadem causa.

En ce qui regarde les décisions de la Commission d'appel de l'immigration, seule une disposition statutaire précise et non la simple existence de l'article 19 de la Loi sur l'immigration pourrait annuler l'effet de cette doctrine fondamentale.

Rappelons brièvement les dispositions de l'article 28(4) de la Loi qui stipule que:

"28(4) Nulle décision rendue en vertu du présent article ne doit empêcher la tenue d'une enquête ultérieure si elle est requise en raison d'un rapport subséquent sous le régime de l'article 19 ou conformément à l'article 25."

Nous nous souvenons que les deux enquêtes tenues à l'égard de M. Yeung ont été tenues en vertu de l'article 25 de la Loi puisqu'il a été arrêté conformément à l'article 16. Toutefois un examen attentif de l'article 28(4) amène à conclure qu'il traite de la tenue d'une "enquête ultérieure" relativement à une situation réelle qui se révèle après la première enquête et décision rendue; en d'autres termes, et en tirant les conclusions extrêmes, cet article est simplement une codification de la Common Law, relativement à la doctrine de chose jugée (res judicata).

Enfin, nous devons mentionner l'affaire Connelly c. Director of Public Prosecutions (1964) A.C. 1254 (Ch. des L.) qui traite de la doctrine apparentée dite d'autrefois acquit. Dans son commentaire le savant éditeur de Spencer-Bower déclare (p. 282):

"In Connelly v. Director of Public Prosecutions it was argued on behalf of the appellant that, even if a plea of autrefois acquit was not strictly tenable, the discretion of the Court should have been exercised to stay the second proceedings as unfair and unjust. This plea did not commend itself on the merits of their Lordships, who saw nothing unfair to the appellant, on the facts in that particular case, in his being charged with robbery when his acquittal on the earlier charge of murder was due to what might be described as a technical accident. But the question of whether there was a discretion, which the court in a more meritorious case might have exercised, is one on which there Lordships found

themselves in some difference. Lord Devlin and Lord Pearce were clearly of the opinion that the Court would have a wide inherent discretion to stay proceedings where these were demonstrated to be unfair to the accused. Lord Reid agreed that there must be a discretion in the case of "anything that savours of abuse of process". Lord Morris on the other hand (and Lord Hodson agreed with him) thought that it was of little help to inquire "in some vague and imprecise way" whether the second prosecution was "unfair"; and they felt that the only test must be (as perhaps was implicit too in Lord Reid's speech) whether the prescribed practice had been followed on presenting the indictment.

"I consider (Lord Morris said) that if a charge is preferred which is contained in a perfectly valid indictment which is so drawn as to accord with what the court has stated to be current practice, and which is presented to a court clothed with jurisdiction to deal with it, and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed."

In view of the division between their Lordships, and in view of the fact that the point does not appear to have been one necessary for the ultimate decision to which the House came, the exercise of the inherent discretion of the Court may perhaps be regarded as a matter still capable of some discussion in a case in which it is crucial. But the extent of the division between their Lordships may not be as great as might at first appear. All appear to have agreed that, as Lord Pearce said "the court has an inherent power to protect its process from abuse"; the question on which they differed was whether such a discretion would enable a judge, confronted with an indictment drawn in accordance with prescribed practice, charging a crime to which autrefois acquit could not validly be pleaded, and presented by a prosecutor insisting on his right to proceed, to order that the proceedings should be stayed. The view of Lord Morris and of Lord Hodson was that the courts being at that stage bound by the rule in R. v. Jones, the first indictment was perfectly regular, and in accordance with the practice actually prescribed by the Court of Criminal Appeal; and the second likewise. No rule of practice

therefore having been infringed by either indictment, it was not to be said "in some vague and imprecise way" to have been unfair that appellant should not have been tried on the second indictment. But Lord Morris and Lord Hodson did not go so far as to say that they would not use the inherent power of the court if in a future case it is found that the plea of an accused has been stultified by the failure of a prosecutor to include all proper charges in the former indictment, contrary to directions given in Connelly's case. It is therefore rather to the exercise than to the existence of the discretion that their Lordships are ultimately seen to have been in some difference."

Dans cet appel si la doctrine de novation (merger) ne s'appliquait pas, la Cour exercerait sa compétence propre pour déclarer que la seconde enquête suivie de l'appel de M. Yeung, est inéquitable, injuste et est un abus de droit.

Pour les raisons ci-dessus mentionnées, l'appel de l'ordonnance d'expulsion du 5 novembre 1969 est accueilli.

Fait à Ottawa le 8 juillet 1970.

Ont souscrit: Jean-Pierre Houle et J.A. Byrne.

Pour l'appelant: aucun;

pour l'intimé: M. A.V. Vass.

35.
Antonio GOMEZ DA COSTA,

applicant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: July 2, 1970; File: 68-6065.

Coram: J.C.A. Campbell, Vice-Chairman, U. Benedetti, J.A. Byrne.

Jurisdiction - "voluntary compliance" and "voluntary execution" with order - whether Board has jurisdiction to hear motion to reopen - Immigration Act: 38; Immigration Regulations: 2(cb).

<u>Held</u>: (J.A. Byrne dissenting as to reasoning)
"Voluntary compliance" with an order (i.e. leaving Canada) does not mean
that the order has been "voluntarily executed". To execute a deportation
order there must be some positive action taken by the Immigration authorities to enforce the order. If such positive action has not been taken
by the Immigration authorities the order cannot be said to have been
executed. The power to deport contained in the order was spent and
such order being spent could not be used. Such order can form the basis
for another deportation order being issued, on proper evidence, by virtue
of Section 38 of the Immigration Act.

Further, the Board has jurisdiction to hear a motion filed by the solicitor of the applicant after the latter had "voluntarily complied" with the order; the motion was withdrawn and then filed once more upon the return of the applicant. The withdrawal of the motion constituted a waiver by the applicant of his rights, if any, which he may have had in respect of any Motion to reconsider the order made against him.

The judgment of the Board was delivered by:

J.C.A. Campbell, Vice-Chairman:

This is a Motion pursuant to Notice of Motion dated the 14th day of May 1970 to rehear the appeal of the applicant on the following grounds:

(a) Evidence now exists that the Appellant's sister is in Canada as a Landed Immigrant and able and willing to nominate the Appellant as a Landed Immigrant to this Country. 35. Antonio GOMEZ DA COSTA,

requérant,

C.

Le Ministre de la Main-d'oeuvre et de l'immigration,

intimé.

Date de la décision: le 2 juillet 1970; Dossier: 68-6065.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Compétence - "obéissance de plein gré" et "exécution de plein gré" de l'ordonnance - compétence de la Commission re requête en réouverture d'instance. - Loi sur l'immigration: 38; le Règlement de l'immigration: 2(cb).

Arrêt: (dissidence de J.A. Byrne quant au raisonnement)
L'"obéissance de plein gré" ne signifie pas que l'ordonnance a été
"exécutée de plein gré". Pour qu'il y ait exécution de l'ordonnance
d'expulsion il doit y avoir un geste positif de la part du Ministère
de l'immigration visant à appliquer l'ordonnance. A défaut d'un tel
geste positif de la part du Ministère de l'Immigration, on ne peut dire
que l'ordonnance a été exécutée. La compétence à expulser que l'on
retrouve dans l'ordonnance était épuisée et l'ordonnance étant épuisée,
elle ne pouvait être utilisée de nouveau. Une telle ordonnance peut
servir de fondement à l'établissement d'une nouvelle ordonnance, si la
preuve en est faite, en raison de l'article 38 de la Loi sur l'Immigration.

De plus, la Commission est compétente à entendre une requête déposée par le conseiller juridique du requérant après que celui-ci eut "obéi de plein gré" à l'ordonnance; la requête fut retirée puis déposée de nouveau au retour du requérant. Le retrait de la requête constituait un abandon, le cas échéant, par le requérant, des droits qu'il aurait pu avoir en rapport à une requête visant à remettre en question l'ordonnance d'expulsion établie contre lui.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

L'audition de cette requête fait suite à la déposition du texte d'une requête en réouverture d'instance, datée du 14 mai 1970 et fondée sur les motifs suivants:

(b) Unusual hardships exist that in the event of the Appellant being deported he will lose his Portuguese passport and will be unable to leave the country.

Mr. J.D. Philp, Barrister, was counsel for the applicant. Mr. P. Betournay, Barrister, represented the respondent.

Before dealing with the submissions of counsel for both the applicant and respondent it may be helpful to set out in chronological order the relevant events leading up to the hearing of the instant Motion following dismissal of Mr. Da Costa's appeal on 30 June 1969. These may be summarized as follows:

- 1. Ordered deported 4 November 1968 pursuant to Section 5(t) of the Immigration Act coupled with 28(1), 29(1), 34(3)(e) and 34(3)(f) of the Immigration Regulations, Part I.
- Appealed to Immigration Appeal Board. Appeal heard on 5 June 1969. Appeal dismissed 30 June 1969. Order to be executed as soon as practicable.
- 3. Written reasons dated 30 June 1969 handed down by Board.
- 4. Notice of Motion dated 11 July 1969 filed by J.D. Philp, solicitor for appellant.
- 5. Formal notice of hearing dated 5 August 1969 sent to those concerned stating hearing of the Motion dated 11 July 1969 would take place on 4 September 1969.
- 6. Board receives letter dated 11 August 1969 from Mr. Philp stating, inter alia, that "Mr. Da Costa has left for Portugal voluntarily and it is thought will be returning". In the said letter Mr. Philp requests the hearing scheduled for September 4, 1969 be adjourned sine die.
- 7. On 4 September 1969 Motion brought on before the Immigration Appeal Board, Mr. Philp states that "Gentlemen, I have received instructions—advice from Mr. Da Costa that he has gone to Portugal—not pursuant to the Deportation Order—that was there in the background I suppose, but he has gone to Portugal because his wife was grievously ill. He is there now. I—I really, I suppose, have no other alternative but to withdraw the Motion. I hesitate to do it because I realize then that this man can never come back to this country without the permission of the Minister. This, of course, puts him in a very bad spot." Motion adjourned sine die pending Mr. Philp receiving instructions from his client, who is in Portugal.

- a) Il peut maintenant être prouvé que la soeur de l'appelant se trouve au Canada à titre d'immigrante reçue et qu'elle est apte et disposée à le désigner pour son admission au Canada en vue d'y résider en permanence.
- b) Il subira de graves tribulations en ce qu'advenant l'expulsion, l'appelant se verra soustraire son passeport portuguais et ne pourra quitter ce pays.

 $\,$  Me J.D. Philp représentait le requérant; Me Paul Betournay occupait pour l'intimé.

Avant d'étudier plus à fond les dépositions des conseillers juridiques du requérant et de l'intimé, il serait bon d'énumérer chronologiquement les faits qui ont précédé l'audition de la présente requête, suite au rejet de l'appel de M. Da Costa le 30 juin 1969. Nous pouvons les résumer comme suit:

- 1- Ordonnance d'expulsion émise le 4 novembre 1968 et fondée sur l'article 5(t) de la Loi sur l'immigration joint aux articles 28(1), 29(1), 34(3)(e) et 34(3)(f) du Règlement de l'Immigration, Partie I.
- 2- Appel à la Commission d'appel de l'immigration. Audition le 5 juin 1969. Rejet de l'appel le 30 juin 1969 avec l'ordre de l'exécuter aussitôt que possible.
- 3- Jugement écrit de la Commission émit le 30 juin 1969.
- 4- Texte d'une requête en date du 11 juillet 1969 déposé par Me J.D. Philp, procureur de l'appelant.
- 5- Avis d'audition en bonne et due forme et datée du 5 août 1969 est envoyé aux intéressés avec la mention que l'audition de la requête datée du 11 juillet 1969 aura lieu le 4 septembre 1969.
- 6- Lettre de Me Philp reçue par la Commission le 11 août 1969; elle allègue entre autre que "Mr. Da Costa has left for Portugal voluntarily and it is thought will be returning". Dans sa lettre, Me Philp demande que l'audition fixée au 4 septembre 1969 soit ajournée sine die.
- 7- Requête entendue par la Commission d'appel de l'immigration; Me Philp déclare ce qui suit: "Gentlemen, I have received instructions - advice from Mr. Da Costa that he has gone to Portugal - not pursuant to the Deportation Order - that was there in the background I suppose, but he has gone to Portugal

- 8. Letter dated 13 January 1970 from Mr. Philp stating that as Mr. Da Costa is in Portugal he is unable to obtain concrete instructions and "being unable to proceed with the Motion am in the hands really of the Board, I suppose".
- 9. Letter dated 20 January 1970 from Immigration Appeal Board to Mr. Philp informing him that as he has withdrawn the Motion of July 11, 1969 made on behalf of Mr. Da Costathe Board will take no further action.
- 10. Letter dated 1 May 1970 from Mr. Philp stating he has received instructions from Mr. Da Costa to proceed with the Motion (of 11 July 1969). The letter goes on to say "I understand he (Mr. Da Costa) is now in the Country".
- 11. Letter dated 5 May 1970 from Immigration Appeal Board to Mr. Philp referring to Board letter of 20 January 1970 and stating "There is no Motion before the Board".
- 12. Letter from Mr. Philp dated 14 May 1970 enclosing Notice of Motion dated 14 May 1970 together with supporting affidavit of Antonio Gomes Da Costa.

Mr. Philp at the outset of his argument told the Court he was abandoning the second ground set out in his Notice of Motion. He submitted that new evidence existed which was not available to the Court at the hearing of the appeal and that such new evidence consisted of the fact Mr. Da Costa now had a sister in Canada who had not been here at the time his appeal was heard. If she had been here he could have been treated as a nominated immigrant which would give him the requisite number of units of assessment.

Mr. Betournay submitted the Court did not have any jurisdiction to hear the Motion as under the scheme of the Immigration Act and its Regulations Mr. Da Costa by taking voluntary departure from Canada had executed the deportation order and satisfied the Immigration Appeal Board's directive of 30 June 1969 (i.e.) that the deportation order was to be executed as soon as practicable. The fact Mr. Da Costa had left Canada voluntarily without the consent of the Immigration authorities was sufficient. Unless and until Mr. Da Costa received the consent of the Minister under Section 38 of the Immigration Act to re-enter Canada he could not return here. Mr. Betournay submitted also that the Motion was frivolous and vexatious as Mr. Da Costa being the subject of an Inquiry (adjourned pending disposition of this Motion) to determine whether he was legally in Canada could, if required, raise the fact that a sister in Canada could nominate Mr. Da Costa in the event he should again be ordered deported and appeal to the Immigration Appeal Board.

because his wife was grievously ill. He is there now. I - I really, I suppose, have no other alternative but to withdraw the Motion. I hesitate to do it because I realize then that this man can never come back to this country without the permission of the Minister. This, of course, puts him in a very bad spot." La requête est ajournée sine die en attendant que Me Philp reçoive des instructions de son client qui se trouve au Portugal.

- 8- Lettre de Me Philp en date du 13 janvier 1970 déclarant que puisque M. Da Costa se trouve au Portugal il ne peut obtenir d'instructions précises et "being unable to proceed with the Motion am in the hands really of the Board, I suppose."
- 9- Lettre de la Commission d'appel de l'immigration en date du 20 janvier 1970 adressée à Me Philp l'informant qu'elle ferme le dossier puisqu'il a retiré sa requête du 11 juillet 1969 en faveur de M. Da Costa.
- 10- Lettre de Me Philp en date du 1 mai 1970 annonçant qu'il a reçu l'instruction de M. Da Costa de procéder avec la requête (du 11 juillet 1969). La lettre ditaussi "I understand he (M. Da Costa) is now in the country".
- 11- Lettre de la Commission d'appel de l'immigration en date du 5 mai 1970 adressée à Me Philp et le référant à la lettre de la Commission en date du 20 janvier 1970 et déclarant "there is no Motion before the Board."
- 12- Lettre de Me Philp en date du 14 mai 1970 jointe à un texte d'une requête datée du 14 mai 1970; un affidavit de Antonio Gomes Da Costa l'accompagne.

Me Philp annonce au début de sa plaidoirie devant la Cour qu'il n'aura pas recours au deuxième motif énoncé dans sa requête. Il allègue qu'il y avait maintenant de la nouvelle preuve que la Cour ne pouvait obtenir à l'audition de l'appel, et que cette nouvelle preuve se résumait comme suit: La soeur de M. Da Costa était maintenant au Canada alors qu'elle ne s'y trouvait pas lorsque fut entendu son appel. Si elle s'était trouvée ici, il aurait pu être considéré comme immigrant reçu ce qui lui aurait donné le nombre de points d'évaluation dont il avait besoin.

Me Betournay allègua que la Commission n'était pas compétente à entendre cette requête puisqu'en vertu de l'économie de la Loi sur l'immigration et de ses règlements, M. Da Costa a exécuté l'ordonnance d'expulsion et a obtempéré à l'ordre de la Commission d'appel de l'immigration du 30 juin 1969, c'est-à-dire que l'ordonnance devait être

Mr. Philp in reply submitted the Board had jurisdiction to hear the Motion to re-open the appeal, that it was not a prerequisite or condition to the hearing of the Motion that the applicant must be in Canada.

The Court by virtue of the Immigration Appeal Board Act had jurisdiction to entertain the appeal of Mr. Da Costa from the Deportation Order dated 4 November 1968 and is declared to be a Court of Record. This jurisdiction carries with it the power to determine every issue properly arising in the case. In Corpus Juris Secundum, Volume 21, Article 87 at Page 135 it is stated:

"Over Entire Controversy

Jurisdiction carried with it power to determine every issue or question properly arising in the case, to do all things with reference thereto authorized by law, and to grant full relief.

It is the policy of the courts to determine the entire controversy between litigants. Accordingly, jurisdiction carries with it the power to hear and determine every issue or question properly arising in the case, to do any and all things with reference thereto authorized by law, and to grant full and complete relief. Thus a court acquiring jurisdiction of property may determine all questions relative to the title, possession, and control thereof."

Has this jurisdiction, once acquired by the Court, been defeated by a subsequent event, namely, the voluntary departure from Canada to Portugal of the applicant? At Page 143 of Corpus Juris Secundum, Volume 21, Article 93, it is stated:

"Events Happening after Jurisdiction Acquired

In general jurisdiction once acquired is not lost or divested by subsequent events.

As a general rule, jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance. So, where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person or the res beyond the jurisdiction of the court. In

exécutée dès que possible en quittant volontairement le Canada. Il était suffisant que M. Da Costa ait quitté le Canada volontairement sans le consentement du Ministère de l'Immigration. A moins que et jusqu'à ce que M. Da Costa reçoive le consentement du Ministre en vertu de l'article 38 de la Loi sur l'immigration afin de revenir au Canada, il ne pouvait revenir ici. Me Betournay allégua de plus que la requête était inutile et frivole puisque M. Da Costa avait le droit, à titre de personne sujette à une enquête (laquelle fut ajournée dans l'attente d'une décision sur cette requête) convoquée afin de déterminer s'il se trouvait au Canada légalement, de soulever, s'il le voulait, le fait qu'il avait une soeur au Canada qui pourrait le désigner si l'on ordonnait de nouveau son expulsion et qu'il en appelait à la Commission d'appel de l'immigration.

Me Philp allégua en réplique que la Commission était compétente à entendre la requête en réouverture d'instance, qu'il n'était pas nécessaire ou requis que le requérant soit au Canada pour l'audition de ladite requête.

En vertu de la Loi sur la Commission d'appel de l'immigration, la Cour avait juridiction pour entendre l'appel de M. Da Costa à l'encontre de l'ordonnance d'expulsion émise le 4 novembre 1968, et elle est une cour d'archives. Cette juridiction entraine la compétence à déterminer chaque point en litige validement soulevé. Dans Corpus Juris Secundum, volume 21, article 87, à la page 135 il est dit:

## "Over Entire Controversy

Jurisdiction carried with it power to determine every issue or question properly arising in the case, to do all things with reference thereto authorized by law, and to grant full relief.

It is the policy of the courts to determine the entire controversy between litigants. Accordingly, jurisdiction carries with it the power to hear and determine every issue or question properly arising in the case, to do any and all things with reference thereto authorized by law, and to grant full and complete relief. Thus a court acquiring jurisdiction of property may determine all questions relative to the title, possession, and control thereof."

Cette compétence de la Cour, une fois acquise, peut-elle être perdue suite à un fait postérieur, soit le départ du requérant du Canada pour le Portugal? A la page 143 du Corpus Juris Secundum, volume 21, article 93, il est énoncé: order, however, that the rule that jurisdiction continues notwithstanding the subsequent event is such as would have prevented the acquisition of jurisdiction in the first instance may apply, there must be an action pending over which the jurisdiction of the court has actually vested; and, although a court has assumed jurisdiction of a case, it may be shown that the facts existing at the time that jurisdiction was assumed were such that the case was not within the jurisdiction of the court, and under such circumstances it is of course improper for the court to proceed further. While it has been stated broadly that jurisdiction once acquired by a statement in good faith of a cause of action within the jurisdiction of the court is not lost by the subsequent elimination of allegations of the complaint, which were essential to the existence of jurisdiction, by pleading, as in the case of an answer or demurrer, or by failure of proof, or in any other way, there is authority for the view that plaintiff, after jurisdiction has attached, may so change his pleading voluntarily that the court will no longer have jurisdiction on the face of the pleading."

In R. v. London, Volume 16, The English and Empire Digest at Page 119, Article 37, it was stated:

"The jurisdiction of the King's superior courts over matters originally cognisable by them, cannot be taken away but by express words, or, perhaps, by a necessary implication arising from the use of words absolutely inconsistent with the exercise of a jurisdiction by the superior courts, and to which effect cannot be given but by the exclusion of such a jurisdiction."

The Court is of the opinion that in leaving Canada there was "voluntary compliance" with the Order. Such "voluntary compliance" does not mean however that the Order has been "voluntarily executed". To execute a deportation order there must be some positive action taken by the Immigration authorities to enforce the order. If such positive action has not been taken by the Immigration authorities the Order cannot be said to have been executed. The power to deport contained in the Order was spent and such Order being spent could not be used in subsequent deportation proceedings taken against Mr. Da Costa. If he returned to Canada, as he did, the Order could not be used again to effect his deportation. While the power in the Order has been spent by "voluntary compliance" nevertheless the Order still exists in fact as it has not been quashed or declared null and void. Such Order can form the basis for another deportation order being issued, on proper evidence, by virtue of Section 38 of the Immigration Act which reads:

"Events Happening after Jurisdiction Acquired

In general jurisdiction once acquired is not lost or divested by subsequent events.

As a general rule, jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance. So, where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person or the res beyond the jurisdiction of the court. In order, however, that the rule that jurisdiction continues notwithstanding the subsequent event is such as would have prevented the acquisition of jurisdiction in the first instance may apply, there must be an action pending over which the jurisdiction of the court has actually vested; and, although a court has assumed jurisdiction of a case, it may be shown that the facts existing at the time that jurisdiction was assumed were such that the case was not within the jurisdiction of the court, and under such circumstances it is of course improper for the court to proceed further. While it has been stated broadly that jurisdiction once acquired by a statement in good faith of a cause of action within the jurisdiction of the court is not lost by the subsequent elimination of allegations of the complaint, which were essential to the existence of jurisdiction, by pleading, as in the case of an answer or demurrer, or by failure of proof, or in any other way, there is authority for the view that plaintiff, after jurisdiction has attached, may so change his pleading voluntarily that the court will no longer have jurisdiction on the face of the pleading."

Dans l'affaire R. c. London, volume 16, The English and Empire Digest, à la page 119, article 37, l'on trouve:

"The jurisdiction of the King's superior courts over matters originally cognisable by them, cannot be taken away but by express words, or, perhaps, by a necessary implication arising from the use of words absolutely inconsistent with the exercise of a jurisdiction by the superior courts, and to which effect cannot be given but by the exclusion of such a jurisdiction."

La Cour est d'avis qu'avec le départ du Canada il y a eu "obéissance de plein gré" à l'ordonnance. Mais cette "obéissance de plein gré" ne signifie pas que l'ordonnance a été "exécutée de plein gré".

"38. Unless an appeal against such order is allowed, a person against whom a deportation order has been made and who is deported or leaves Canada shall not thereafter be admitted to Canada or allowed to remain in Canada without the consent of the Minister."

There would appear to be nothing in the Immigration Appeal Board Act or in the Immigration Act which deprives the Court, either expressly or impliedly, of its jurisdiction to hear the instant motion. Section 38 of the Immigration Act, referred to above is concerned with the "status" of an individual, it does not deal with jurisdiction. The Court finds that it has continuing jurisdiction to hear and determine the instant Motion as the said Motion has reference to an appeal over which the Court had original jurisdiction.

Mr. Da Costa left Canada voluntarily presumably after he instructed his solicitor to file the Notice of Motion dated 11 July 1969. This Motion was subsequently withdrawn as Mr. Philp was unable to obtain instructions from Mr. Da Costa who was in Portugal and it was not until Mr. Da Costa returned to Canada in the early part of 1970 that the instant Motion was launched. In the Court's opinion and it so finds the withdrawal of the Motion of 11 July 1969 constituted a waiver by Mr. Da Costa of his rights, if any, which he may have had in respect of any Motion to reconsider the deportation order made against him on the 4th day of November 1968. The instant Motion is therefore dismissed. It is unnecessary to deal with the second argument advanced by Mr. Betournay that the Motion is frivolous and vexatious.

Motion dismissed.

Dated at Ottawa, this 13th day of July 1970.

Concurred in by: U. Benedetti

Pour qu'il y ait exécution de l'ordonnance d'expulsion il doit y avoir un geste positif de la part du Ministère de l'Immigration visant à appliquer l'ordonnance. A défaut d'un tel geste positif de la part du Ministère de l'Immigration, on ne peut dire que l'ordonnance a été exécutée. La compétence à expulser que l'on retrouve dans l'ordonnance était épuisée et l'ordonnance étant épuisée, elle ne pouvait être utilisée de nouveau à l'occasion de nouvelles démarches en vue de l'expulsion prises contre M. Da Costa. Advenant son retour au Canada. comme de fait cela s'est produit, l'ordonnance ne pouvait être utilisée de nouveau pour l'expulser. Même si la compétence à même l'ordonnance fut épuisée par suite de l'"obéissance de plein gré", l'ordonnance existe toujours en fait cependant, car elle n'a pas été annulée ou déclarée nulle et de nul effet. Une telle ordonnance peut servir de fondement à l'établissement d'une nouvelle ordonnance, si la preuve en est faite, en raison de l'article 38 de la Loi sur 1'immigration.

Il n'y a rien, semble-t-il, dans la Loi sur la Commission d'appel de l'immigration ou dans la Loi sur l'immigration qui fait perdre à la Commission d'appel de l'immigration sa compétence à entendre la présente requête. L'article 38 de la Loi sur l'immigration cité plus haut traite du statut de l'individu et non de la juridiction ou de la compétence. La Cour arrête qu'elle est toujours compétente à entendre et décider de la présente requête puisque cette requête fait suite à un appel à l'égard duquel elle avait compétence originellement.

M. Da Costa quitta le Canada de plein gré, apparemment après avoir donné à son avocat des instructions de déposer une requête, qui fut datée du 11 juillet 1969. Par la suite, cette requête fut retirée parce que Me Philp ne pouvait obtenir d'instructions de M. Da Costa qui se trouvait au Portugal; ce n'est qu'au retour au Canada de M. Da Costa, au début de 1970, que la présente requête fut déposée. La Cour est d'avis et elle arrête ainsi, que le retrait de la requête du 11 juillet 1969 constituait de la part de M. Da Costa, un abandon, le cas échéant, des droits qu'il aurait pu avoir en rapport à une requête visant à remettre en question l'ordonnance d'expulsion établie contre lui le 4 novembre 1968. La présente requête est donc rejetée. Il n'est pas nécessaire de traiter du deuxième argument de Me Betournay à l'effet que la requête serait inutile et frivole.

Requête rejetée.

Fait à Ottawa, ce 13<sup>e</sup> jour de juillet 1970.

A souscrit: U. Benedetti.

J.A. Byrne, dissenting:

With great respect I cannot agree with the majority of the Board that the Board has jurisdiction to hear any matter in respect of a deportation order executed pursuant to section 15(1) of the Immigration Appeal Board Act, either voluntarily or otherwise.

In my opinion the order has in effect been complied with and therefore, when the appellant made a voluntary departure from Canada, there is nothing before the Board upon which the appellant may base a motion. The only course open to him lies within the terms of section 38 of the Immigration Act, which reads as follows:

"38. Unless an appeal against such order is allowed, a person against whom a deportation order has been made and who is deported or leaves Canada shall not thereafter be admitted to Canada or allowed to remain in Canada without the consent of the Minister."

For the Board to take unto itself jurisdiction in any matter respecting a deportation order that has been executed, it does effectively circumvent the requirements of section 38. Section 38 of the Immigration Act would, as a consequence, be rendered almost meaningless where a deportee chooses to take action on a motion within the time limit which may conceivably have been set by the Rules.

The instant case differs widely from that of Messer v. Minister of Manpower and Immigration, in which the Board ruled it had jurisdiction to review a stayed order although the deportation order had been voluntarily executed by the appellant's departure from Canada. The matter in this case was an issue still before the Board and could only be disposed of by a review. Had the appellant remained outside of Canada until after the review date upon which the order was quashed, he would, of course, not have been again subject to deportation pursuant to section 38 of the Immigration Appeal Board Act, but may have been for other reasons found inadmissible.

Therefore, while I agree with the effect of the decision of the majority, I do not agree with the procedure upon which the decision was rendered.

Dated at Ottawa this 13th day of July 1970.

For the applicant: J.D. Philp, Barrister and Solicitor; for the respondent: Paul Betournay, Barrister and Solicitor.

J.A. Byrne, dissidant:

Dans le plus grand respect, je ne puis être d'accord avec la majorité de la Cour que la Commission a juridiction d'entendre toute affaire liée à une ordonnance d'expulsion exécutée conformément au paragraph (1) de l'article 15 de la Loi sur la Commission d'appel de l'immigration, que cette exécution soit de plein gré ou autrement.

A mon avis, on a obtempéré à l'ordonnance et, par conséquent, lorsque l'appelant a quitté le Canada de plein gré, il n'y avait plus rien devant la Commission qui aurait pu servir de fondement à une requête. Son seul recours se trouve dans les dispositions de l'article 38 de la Loi sur l'immigration, qui se lit comme suit:

"38. Sauf lorsqu'un appel d'une telle ordonnance est admis, une personne contre qui une ordonnance d'expulsion a été rendue et qui est expulsée ou quitte le Canada, ne doit pas subséquemment être admise dans ce pays, ou il ne doit pas lui être permis d'y demeurer, sans le consentement du Ministre."

Lorsque la Commission dit avoir juridiction dans toute affaire reliée à une ordonnance d'expulsion qui fut exécutée, elle ignore les dispositions de l'article 38. Cet article de la Loi sur l'immigration serait alors presque vide de sens lorsqu'une personne sous le coup d'une ordonnance d'expulsion décide de déposer une requête dans les délais que peuvent prescrire les Règles.

La présente affaire se distingue facilement de Messer c. Le Ministre de la Main-d'oeuvre et de l'Immigration, où la Commission arrêta qu'elle était compétente à ré-éxaminer une ordonnance dont elle avait décrété le sursis d'exécution, même si l'appelant a obtempéré à l'ordonnance d'expulsion en quittant le Canada. En cette cause, le litige était toujours devant la Commission et ne pouvait être réglé que par suite d'un réexamen du dossier. L'appelant eut-il demeuré à l'extérieur du Canada jusqu'après la date du réexamen, alors que l'ordonnance fut annulée, il n'aurait pas donc été de nouveau sujet à l'expulsion en vertu de l'article 38 de la Loi sur la Commission d'appel de l'immigration; il aurait cependant pu subir l'expulsion pour d'autres motifs.

Donc, même si je souscris à l'effet de la décision de la majorité, je ne puis être d'accord avec le raisonnement sur lequel il se fonde.

Fait à Ottawa ce 13<sup>e</sup> jour de juillet 1970.

Pour le requérant: Me J.D. Philp; pour l'intimé: Me Paul Betournay. 36. Antonio Guiseppe SILVINI,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 3, 1970; File: 69-566.

Coram: J.C.A. Campbell, Vice-Chairman, Gérard Legaré, J.A. Byrne.

Ministerial certificate - conditions for use of - effect of statutory right of appeal. - Immigration Regulations: 32(3)(b), 32(4)(b); Immigration Appeal Board Act: 21.

<u>Held</u>: Where there is a right of appeal given by Statute, such a right must be an effective right. The Court is entitled to examine the determination of the Minister (re s. 21) and is not necessarily bound to accept his decision. The Court, being a Court of appeal, is entitled to examine all the facts, including the reasons leading up to the opinion formed by the Immigration officer who interviewed the appellant and which opinion was subsequently approved by a designated official in accordance with section 32(4)(b) Immigration Regulations, in order that it can determine whether the material was sufficient in law to support the Minister's decision. As such material is not available, the Court allows the appeal.

The judgment of the Board was delivered by:

## J.C.A. Campbell, Vice-Chairman:

This is an appeal from a Deportation Order dated 1 April 1969, made by Special Inquiry Officer J. Wellsman at the Canadian Immigration Office, Edmonton, Alberta, in respect of the appellant, Antonio Guiseppe Silvini or Tony Silvys, in the following terms:

(i) you are not a Canadian citizen,

(ii) you are not a person with Canadian domicile,

- (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions or requirements of this Act or Regulations by reason of:
  - a) paragraph (b) of subsection (3) of section 34 of the Immigration Regulations, Part I, amended in that you are a person who would not on application be issued a visa if outside Canada for if

36. Antonio Guiseppe SILVINI,

appelant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 3 septembre 1970; Dossier: 69-566.

Coram: J.C.A. Campbell, vice-président, Gérard Legaré, J.A. Byrne.

Certificat du Ministre - conditions du recours au - effet du droit d'appel statutaire. - Règlement sur l'immigration: 32(3)(b), 32(4)(b) - Loi sur la Commission d'appel de l'immigration: 21.

Arrêt: Lorsqu'il existe un droit d'appel statutaire, ce droit d'appel doit être réel. La Cour a droit d'examiner la décision du Ministre (re l'a. 21) et peut ne pas l'accepter. La Cour, en tant que Cour d'appel, doit examiner tous les faits, y compris les motifs qui ont servi de fondement à l'opinion du fonctionnaire à l'immigration qui questionna l'appelant, laquelle opinion fut ensuite certifiée par un fonctionnaire désigné en vertu de l'article 32(4)(b) du Règlement de l'immigration, ceci afin de pouvoir déterminer si la décision du Ministre était bien fondée en droit. Puisque ce qui a servi de fondement à cette décision ne fut pas déposé en preuve, la Commission accueille l'appel.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

La présente affaire est un appel de l'ordonnance d'expulsion établie en date du 1 avril 1969 par l'enquêteur spécial J. Wellsman, aux bureaux de l'immigration canadienne à Edmonton, Alberta, contre l'appelant, Antonio Guiseppe Silvini ou Tony Silvys, dans les termes suivants:

" (i) you are not a Canadian citizen,

(ii) you are not a person with Canadian domicile,

(iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions or requirements of this Act or Regulations by reason of:- examined outside Canada you would have been refused admission pursuant to paragraph (b) of subsection (4) of section 32 of the Immigration Regulations, Part I, amended as an independent applicant because, in the opinion of an Immigration Officer there is good reason why the norms set out in Schedule A do not reflect your chances of establishing yourself successfully in Canada; this reason having been approved in accordance with paragraph (b) of subsection (4) of section 32 of the Immigration Regulations, Part I, amended.

b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with subsection (1) of section 28 of the Immigration Regulations, Part I."

The appellant and his counsel Senator J.H. Prowse were present at the appeal hearing. Mr. P. Betournay, Barrister, represented the respondent.

The appellant is a citizen of Italy by birth in that country on 11 May 1947. His parents reside in Italy and he does not have any brothers or sisters. At the time of the Inquiry Mr. Silvini was unmarried; however, at the appeal hearing he presented a marriage certificate for the Court's inspection showing he was married on 17 November 1969. He has no relatives in Canada. In Italy the appellant attended a private school and has training as a printer. When approximately eleven years of age he became a singer and since then music and entertainment has been his chief occupation. He uses the stage name of Tony Sylvys.

On 12 June 1965 Mr. Silvini entered Canada at Toronto International Airport as a non-immigrant visitor pursuant to Section 7(1)(c) of the Immigration Act. His status as a visitor was to expire on 12 September 1965. On or about 2 November 1965 he applied for permanent residence in Canada and by letter dated 2 November 1965 the Immigration Department gave him written permission to accept employment in Canada. In this country he has followed the occupation of entertainer, singer and music teacher and at the time of the Inquiry he estimated his average income to be between six and seven thousand dollars a year.

While in Toronto, the appellant was arrested in connection with a quantity of counterfeit Canadian currency. He was released after a preliminary hearing.

- a) paragraph (b) of subsection (3) of section 34 of the Immigration Regulations, Part I, amended in that you are a person who would not on application be issued a visa if outside Canada for if examined outside Canada you would have been refused admission pursuant to paragraph (b) of subsection (4) of section 32 of the Immigration Regulations, Part I, amended as an independent applicant because, in the opinion of an Immigration Officer there is good reason why the norms set out in Schedule A do not reflect your chances of establishing yourself successfully in Canada; this reason having been approved in accordance with paragraph (b) of subsection (4) of section 32 of the Immigration Regulations, Part I, amended.
- b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with subsection (1) of section 28 of the Immigration Regulations, Part I."

L'appelant était présent et représenté par son procureur, le Sénateur J.H. Prowse, à l'audition de l'appel. Me P. Betournay occupait pour le Ministre.

L'appelant, citoyen italien de naissance, est né en ce pays le 11 mai 1947. Ses parents résident en Italie et il n'a ni frère ni soeur. Lors de l'enquête, M. Silvini était célibataire mais, à l'audition de l'appel, il déposa un certificat de mariage à la Cour, lequel indiquait qu'il s'est marié le 17 novembre 1969. Il n'a aucun parent au Canada. En Italie, il fréquenta une école libre (private school) et reçu une formation d'imprimeur. A l'âge de onze ans environ il devint chanteur et depuis, la musique et le monde du spectacle sont devenus sa principale préoccupation. Il se sert du nom d'emprunt Tony Sylvys.

Le 12 juin 1965, M. Silvini est entré au Canada à l'Aéroport international de Toronto à titre de non-immigrant et visiteur en vertu de l'article 7(1)(c) de la Loi sur l'immigration. Son statut de visiteur expirait le 12 septembre 1965. Le ou vers le 2 novembre 1965 il formula une demande de résidence permanente au Canada; le Ministre de l'immigration l'autorisa par lettre datée du 2 novembre 1965 d'accepter de l'emploi. En ce pays, donc, il fut comique, chanteur et professeur de musique. Lors de l'enquête, il évalua son revenu annuel moyen entre six et sept mille dollars.

At the outset of the appeal hearing counsel for the appellant made a motion for the production of the "good reasons" referred to in the deportation order. He argued that failure to produce them was contrary to Section 2(e) of the Bill of Rights which reads:

- "2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
  - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

Mr. Betournay took the position that as the appellant had not given any notice of his motion, the Court should not hear it. Secondly, that the record before the Court being complete and in compliance with the governing provisions of the Immigration Regulations there was no provision for the disclosure of the "reasons". He argued that the Immigration Regulations provide for the disclosure of the "reasons" being made to a designated officer. This had been done and these "reasons" do not form part of the record. He submitted that the basis of the deportation order is the approved opinion, not the reasons.

 $\,$  The Court reserved judgment on the Motion and proceeded to hear the evidence of the appellant.

In his final submission Mr. Betournay reiterated and elaborated on his argument that there was no provision in the Immigration Regulations for the disclosure of the "reasons" leading up to the approved opinion. In support of his argument he referred the Court to two English cases, Liversidge v Anderson (1942) A.C. 206 and Carltona v Commissioner of Works (1943) 2 All E.R. 560. The decisions in these two cases were based upon 1939 Emergency wartime legislation and powers in force and effect in the United Kingdom. In the opinion of this Court these two wartime decisions cannot be taken as an accurate statement of the law.

Mr. Betournay argued also that an adverse approved opinion is non-compliance with the Immigration Regulations in the same way as is non-production of a visa. He referred to the decision of the Supreme Court

A Toronto, l'appelant fut arrêté en rapport avec la découverte d'une certaine quantité de fausse monnaie canadienne. Il fut libéré après enquête préliminaire.

Dès le début de l'audition de l'appel, le procureur de l'appelant formula une requête en vue de faire produire les "good reasons" qui sont mentionnées dans l'ordonnance d'expulsion. Il allégua que ne pas les produire serait contraire à l'article 2(e) de la Déclaration des droits, lequel se lit comme suit:

- "2. Interprétation de la législation. Toute loi du Canada, à moins qu'une loi du parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la "déclaration canadienne des droits", doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transmission, et -- en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
  - e) privant une personne du droit à une audition impartiale de sa cause selon les principes de justice fondamentale, pour la définition de ses droits et obligations; ("to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations")."

Me Betournay allégua que la Cour ne devrait pas entendre la requête puisque l'appelant n'en n'avait aucunement donné avis. Deuxièmement, il n'y a aucune disposition dans le Règlement de l'immigration qui prévoient le dévoilement des "reasons", car le dossier déposé devant la Cour est complet et conforme aux dispositions du dit Règlement. Il allégua que le Règlement de l'immigration prévoit le dévoilement de ces "reasons" à un fonctionnaire désigné. Ce fut fait et ces "reasons" ne font pas partie du dossier. Il soumit que le fondement de l'ordonnance est l'opinion certifiée et non les motifs.

La Cour prit la requête en délibéré et entendit la preuve déposée par l'appelant.

Dans sa plaidoirie finale, Me Betournay réitéra et élabora son argument à l'effet qu'aucune disposition du Règlement de l'immigration ne prévoit le dévoilement des "reasons" qui ont entrainé l'opinion certifiée. Au soutien de cet argument, il référa la Cour à deux affaires anglaises: Liversidge c. Anderson (1942 A.C. 206) et Carltona

of Canada in the Koula Gana appeal but submitted that the Koula Gana decision did not apply to the instant appeal as it was an appeal from the assessment made by an Immigration officer. The Court agrees with Mr. Betournay that Koula Gana has no application to the present appeal.

In summary Mr. Betournay took the position that the opinion called for by the Immigration Regulations cannot be inquired into because it is purely an administrative function on the part of the Minister and the reasons for such an opinion are not relevant. It is the approved opinion, not the reasons therefor, that is a ground for deportation.

In his reply Senator Prowse submitted that there was no sense in having an Appeal Board if the law presumably created a situation that the Board can't deal with; that the appellant is deprived of his right to a fair hearing as he doesn't know the case he has to answer. He referred to Section 21 of the Immigration Appeal Board Act and pointed out that if that Section is invoked the Minister and the Solicitor General must declare their reasons and it is inconceivable that two junior civil servants have rights greater than that given to two Ministers.

The Court is of the opinion that where there is a right of appeal given by Statute, as in the instant case, then such right of appeal must be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily bound to accept his decision. The Minister must act according to the rules of reason and justice, not according to private opinion; he must act according to law and not humour, his decision must not be arbitrary, vague and fanciful but legal and regular. If reasons for the opinion are not given then the Minister could render the right of appeal given by Statute completely nugatory. The Court, being a Court of Appeal, finds that it is entitled to examine all the facts, including the reasons leading up to the opinion formed by the Immigration officer who interviewed the appellant and which opinion was subsequently approved by a designated official in accordance with Section 32(4)(b) of the Immigration Regulations, in order that it can determine whether the material was sufficient in law to support the decision of the Minister, acting by and through his duly authorized officials. As such material is not available the Court therefore allows the appeal.

As a result of the Court's decision to allow the appeal it is unnecessary to decide the Motion made by the appellant at the commencement of the appeal.

Dated at Ottawa, this 3rd day of September 1970.

Concurred in by: Gérard Legaré and J.A. Byrne,

For the appellant: Senator J.H. Prowse;

for the respondent: Paul Betournay, Barrister and Solicitor.

c. Commissioner of Works (1943) 2 All E.R. 560. Les jugements dans ces deux affaires étaient fondés sur la législation et les pouvoirs d'urgence en vigueur au Royaume-Uni durant la guerre. De l'avis de la Cour, ces deux décisions du temps de la guerre ne peuvent être considérées comme de fidèles énoncés de l'état du droit.

Me Betournay allégua aussi qu'une opinion défavorable certifiée signifie une infraction au Règlement de l'immigration tout comme l'est le défaut de présenter un visa. Il référa à la décision de la Cour suprême du Canada dans l'affaire Koula Gana mais soumit que cette décision ne s'appliquait pas en l'espèce car c'était un appel à l'encontre d'une évaluation d'un fonctionnaire à l'immigration. La Cour est d'accord avec Me Betournay à l'effet que l'affaire Koula Gana ne s'applique pas dans cet appel-ci.

En somme, Me Betournay était d'avis que l'opinion réclamée par le Règlement de l'immigration ne peut être examinée car c'est une fonction purement administrative du Ministre et que les motifs qui ont amenés cette opinion ne sont aucunement pertinents. C'est l'opinion certifiée, et non les motifs qui y ont présidé, qui sert de fondement à l'ordonnance d'expulsion.

Dans sa réponse, le Sénateur Prowse allégua qu'il ne sert à rien d'avoir une Commission d'appel si la loi institua, par présomption, une situation dont la Commission ne peut être saisie; que l'appelant se voit privé de son droit à une audition impartiale s'il ignore ce à quoi il doit faire face. Il référa à l'article 21 de la Loi sur la Commission d'appel de l'immigration et avança que s'ils y ont recours, le Ministre et le Solliciteur-Général doivent dévoiler leurs motifs pour ce faire, et qu'il est inconcevable que deux fonctionnaires publics subalternes aient plus de droits que ceux donnés à deux ministres.

La Cour est d'avis que lorsqu'il existe un droit d'appel statutaire, tout comme en l'espèce, ce droit d'appel doit être réel. Un des effets de ceci est que la Cour a droit d'examiner la décision du Ministre et peut ne pas l'accepter. Le Ministre doit agir raisonnablement et de façon juste et non uniquement à partir d'une opinion personnelle; il doit agir en conformité à la loi et non de son humeur; sa décision ne doit pas être arbitraire, vague, capricieuse, mais plutôt juridique et conforme à la loi. Si les motifs de l'opinion ne sont pas dévoilés, le Ministre du même coup rendrait le droit d'appel totalement futile et sans effet juridique. La Cour, en tant que Cour d'appel, doit examiner tous les faits, y compris les motifs qui ont servi de fondement à l'opinion du fonctionnaire à l'immigration qui questionna l'appelant, laquelle opinion fut ensuite certifiée par un fonctionnaire désigné en vertu de l'article 32(4)(b) du Règlement de l'immigration, ceci afin de pouvoir déterminer si la décision du Ministre-agissant par

l'entremise de ses fonctionnaires dûment autorisés - était bien fondée en droit. Puisque ce qui a servi de fondement à cette décision ne fut pas déposé en preuve, la Commission accueille l'appel.

Donc, par suite de la décision de la Cour accueillant l'appel, il n'est pas nécessaire d'adjuger sur la requête de l'appelant formulée dès le début de l'audition de l'appel.

Fait à Ottawa, ce 3e jour de septembre 1970.

Ont souscrit: Gérard Legaré et J.A. Byrne.

Pour l'appelant: le Sénateur J.H. Prowse;

pour l'intimé: Me Paul Betournay.

37.
Georgios TZEMANAKIS,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: October 9, 1970; File: 69-1824

<u>Coram</u>: Miss Janet V. Scott, Chairman, Jean-Pierre Houle, Vice-Chairman, Lucien Cardin,

Section 15 Immigration Appeal Board Act - nature of Board's jurisdiction - "Political persecution" - compassionate and humanitarian considerations - equity - nature of - effect of marriage on - Immigration Appeal Board Act: 15.

<u>Held</u>: The appeal is dismissed on law. In Section 15 of the Immigration Appeal Board Act, the legislature provided special relief for unusually difficult cases where the application of the letter of the law could be too rigid and which could even, under certain circumstances, give rise to veritable injustices.

Equity cannot be justifed when the evidence points to a careless disregard of the law or a wilful attempt to bypass it.

Each case must be dealt with on its own merits within the context of Section 15.  $\,$ 

In my opinion, the subjective aspects of appellant's request, that is the attitude, the good faith, the reasonableness, and the sincerity of the person seeking equity, as adduced from the evidence in the case, are as important in exercising equitable jurisdiction as are the credible factual hardships involved, which form the objective aspect of the appellant's request for special relief. However, basic to and more fundamental than the subjective aspect of the appellant's request, there is an extremely important principle which underlies our whole system of law and indeed all forms of acceptable human relationships, and that is: all intelligent, normal persons, acting of their own free will and in full knowledge of what they are doing are not only rightly held responsible for their acts but also for the consequences of their acts.

In the instant case, in spite of the fact that the appellant and his wife knew before being married that the appellant's deportation would present a choice on the part of the appellant's wife to either follow her husband to Greece or to remain in Canada and be separated from her deported husband, they chose of their own free will and in full knowledge of the consequences to marry anyway. The Court declines to exercise its equitable jurisdiction under Section 15.

37. Georgios TZEMANAKIS,

appelant,

C.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 9 octobre 1970; Dossier: 69-1824.

Coram: Mlle J.V. Scott, président, Jean-Pierre Houle, vice-président, Lucien Cardin.

Artile 15 Loi sur la C.A.I. - nature de la compétence de la Commission-"Persécution politique" - Motifs de pitié et considérations humanitaireséquité - nature - effet du mariage sur. - Loi sur la Commission d'appel de l'immigration: 15.

Arrêt: L'appel est rejeté en droit.

A l'article 15 de la Loi sur la Commission d'appel de l'immigration, la législature a prévu un redressement spécial dans les affaires particulièrement difficiles, instances où l'application de la Loi à la lettre serait trop inflexible, ce qui pourrait amener de véritables injustices dans certaines situations.

On ne peut justifier l'exercice de l'équité quand la preuve montre que la personne qui a recours à l'équité a inconsidérément enfreint la Loi ou a délibérement tenté de la contourner.

La Cour doit examiner le fond de chaque affaire dans le cadre de l'article 15 de la Loi sur la Commission d'appel de l'immigration.

Je suis d'avis que l'aspect subjectif de la requête de l'appelant, i.e. l'attitude, la bonne foi, le caractère raisonnable et la sincérité de la personne qui a recours à l'équité de la Cour, facteurs qui doivent faire partie de la preuve de l'affaire, présente un caractère aussi décisif pour la Cour qui exerce sa juridiction d'équité que l'aspect objectif de la requête de l'appelant, à savoir les tribulations, qui de fait découlent de l'expulsion. Par ailleurs, au-delà de l'aspect subjectif de la requête de l'appelant, il existe un principe des plus fondamentaux sur lequel repose la loi et toutes formes de relations humaines à savoir: toute personne intelligente, normale qui agit d'ellemême, de plein gré et en toute connaissance de ce qu'elle fait, est non seulement responsable de ses actes mais aussi pour les conséquences de ceux-ci.

En l'espèce, avant lour mariage l'appelant et son épouse savaient que l'expulsion de l'appelant placerait l'épouse devant le choix suivant: ou suivre son mari en Grèce, ou bien rester sans lui au Canada; néanmoins ils se sont mariés de plein gré et conscients des conséquences de leur acte. La Cour refuse d'exercer sa juridiction d'équité prévue à l'article 15.

## The judgment of the Board was delivered by:

## Lucien Cardin:

This is the appeal from a deportation order issued against Georgios TZEMANAKIS by Special Inquiry Officer L. Foisy on the 9th of September 1969 at Bordeaux Gaol, 800 Gouin Boulevard West, Montreal, P.Q., in the following terms:

- "1) You are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada:
- 4) in accordance with subsection (2) of Section 19 of the Immigration Act, you are subject to deportation."

Mr. Georgios Tzemanakis is 23 years old, born on the Island of Crete, Greece, and a Greek citizen. The appellant's parents, two sisters and a brother reside in Greece. Mr. Tzemanakis has had six years of schooling in Greece and worked one year as a cabinet-maker.

The appellant arrived in Canada at Sorel, Quebec, on June 4, 1966 as a member of the crew of the ship Akmeon, which he deserted at about that time, and remained in Canada without the permission of the Immigration authorities after the departure of the ship.

In August 1969, the appellant was arrested and condemned to three months in jail. On September 9, 1969 an inquiry concerning the appellant was held at Bordeaux Jail and Mr. Tzemanakis was ordered deported. The appellant's sentence ended on September 29, 1969, and he was released by the Immigration authorities on a \$200.00 cash bond.

At the time of the inquiry the appellant was single and had, as the only relative in Canada, a cousin, Mr. Andreas Tzemanakis, a Canadian citizen.

The appellant filed an appeal which was heard on October 9, 1970. During the hearing the appellant testified that he was married on

Le jugement de la Commission fut rendu par:

Lucien Cardin:

Appel d'une ordonnance d'expulsion émise à l'encontre de Georgios TZEMANAKIS par l'enquêteur spécial M. L. Foisy le 9 septembre 1969 à la prison de Bordeaux située 800 ouest boulevard Gouin à Montréal, P.Q. L'ordonnance se lit comme suit:

- "1) You are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;
- 4) in accordance with subsection (2) of Section 19 of the Immigration Act, you are subject to deportation. "

M. Georgios Tzemanakis est âgé de 23 ans, il est né sur l'île de Crète, et il est citoyen grec. Les parents de l'appelant ainsi que ses deux soeurs et son frère demeurent en Grèce, où M. Tzemanakis est allé à l'école pendant six ans et où il a travaillé durant un an comme ébéniste.

Le 4 juin 1966 l'appelant est arrivé au Canada à Sorel, P.Q., en tant que membre d'équipage du bateau l'Akmeon; il a déserté l'Akmeon aux environs du 4 juin 1966; après le départ du navire il est resté au Canada sans avoir obtenu des autorités de l'immigration l'autorisation de le faire.

En août 1969, l'appelant se voyait arrêté et condamné à purger une peine de trois mois de prison. Le 9 septembre 1969 à la prison de Bordeaux on tenait une enquête à l'égard de M. Tzemanakis à la suite de laquelle l'appelant se voit l'objet d'une ordonnance d'expulsion. Le 29 septembre 1969 l'appelant achevait de purger sa peine de prison et les autorités de l'immigration le libérait sur paiement d'un cautionnement de \$200.

Au moment de l'enquête l'appelant était célibataire et n'avait comme parent proche au Canada que son cousin M. Andreas Tzemanakis lequel est citoyen canadien.

March 8, 1970, and that his wife was three months pregnant. A marriage certificate and a doctor's certificate attesting to the pregnancy of the appellant's wife were produced. It appears that the appellant proposed to his future wife one week after meeting her and they were married one month after their first meeting.

According to her testimony, the appellant's wife knew that her husband was illegally in Canada and could be deported to Greece. The appellant's wife claimed that, should her husband be deported, she would accompany him to Greece, even though she was a landed immigrant since June 1969.

The validity of the deportation order was not contested and the appeal is dismissed under Section 14 of the Immigration Appeal Board Act.

As to the Court's equitable jurisdiction, the appellant not being a permanent resident in Canada, Section 15(1)(b)(i)(ii) is applicable.

Section 15(1)(b)(i) reads:

"the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship,"

The appellant, not having done his military service in Greece, would most likely have to serve in the Greek military forces, if he were deported there. There is no question here of punishment for political activities. Would the appellant suffer unusual hardship by having to do his military service in Greece, if he were deported? Compulsory military service is a law applicable to all Greek male citizens within a certain age group, and it cannot be said that the appellant would suffer unusual hardship by having to do his military service. Mr. Tzemanakis would be doing nothing more than what thousands of his compatriots are forced to do every year under the existing Greek law.

Section 15(1)(b)(ii) reads:

"the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,"

The appellant married a landed immigrant who is now pregnant. Should the appellant be deported and forced to do his military service, whether his wife followed him to Greece or whether she remained in Canada, the appellant would be separated from his wife and child for a period of approximately two years. From the wife's point of view, the deportation

L'appelant a inscrit en appel et le 9 octobre 1970, la Commission d'appel de l'immigration entendait son appel. A l'audition l'appelant a déclaré s'être marié le 8 mars 1970 et que son épouse était enceinte depuis trois mois. Un certificat de mariage, ainsi qu'un certificat médical à l'effet que Mme Tzemanakis est enceinte ont été déposés. Il apparaît que l'appelant aurait demandé sa future épouse en mariage une semaine après leur première rencontre; un mois après ils se marièrent. D'après le témoignage de Mme Tzemanakis, l'épouse de l'appelant, celle-ci savait que son époux était entré d'une façon illégale au Canada et qu'il s'exposait à être expulsé et à retourner en Grèce. L'épouse de l'appelant a déclaré que si son mari était expulsé elle rejoindrait la Grèce avec lui, bien qu'elle soit une immigrante reçue depuis le mois de juin 1969.

La validité de l'ordonnance d'expulsion n'a pas été contestée; en conséquence l'appel est rejeté selon l'article 14 de la Loi sur la Commission d'appel de l'immigration.

Quant à la juridiction d'équité, la Cour examine cette affaire sous l'article 15(1)(b)(i)(ii) puisque l'appelant ne réside pas au Canada d'une façon permanente.

L'article 15(1)(b)(i) énonce que:

"de l'existence de motifs raisonnables de croire que, si l'on procède à l'éxécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations."

Si l'appelant est expulsé, il devra probablement servir dans les rangs de l'armée grecque, puisqu'il n'a pas effectué son service militaire en Grèce. Le cas de persécution pour activité d'un caractère politique ne s'applique pas dans cette affaire. A présent, peut-on soutenir que, dans l'éventualité d'une expulsion, l'appelant sera soumis à de graves tribulations s'il accompli son service militaire en Grèce? Selon la loi grecque, tout citoyen grec d'un certain âge se voit obligé de joindre les rangs de l'armée grecque; ainsi on ne peut soutenir que l'appelant serait soumis à de graves tribulations s'il devait faire son service militaire. En effet, M. Tzemanakis se trouverait dans une situation identique à celle de milliers de ses compatriotes aux termes de la loi en vigueur en Grèce.

L'article 15(1)(b)(ii) énonce que:

"l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial." of her husband means that she will either have to give up her status of landed immigrant and return to Greece with her husband, or remain in Canada with her child and provide for the child and herself in the absence of her husband.

It has been established by the Court that ground for compassionate relief extends to persons other than the appellant. In the appeal of Nikolaos AGOUROS, File No. 69-562, we read: (Page 7)

"The scope of section 15(1)(b)(ii) extends to persons other than the person concerned. The "special relief" is granted to him, since he is the person falling within the Board's jurisdiction, but there is nothing in the subsection — as "there is in section 15(1)(b)(i) — restricting the "compassionate or humanitarian considerations" to him alone. While these doubtless cannot be said to extend to the world at large, the wording of the subsection clearly covers the situation of persons in close relationship with the person concerned, whose own future is closely allied with his and whose fate will be directly affected by the decision taken in respect of him."

There is no doubt that the deportation of the appellant would mean the separation of a family and would in fact impose hardships on all the members of the family. In this case, do these humanitarian and compassionate considerations warrant, in the opinion of the Board, the granting of special relief? Are these hardships, involving marriage, pregnancy and separation of a family, etc., the only criteria which should apply for the Court's judicial exercise of its equitable jurisdiction?

Equity, on which Section 15 is based, is not easy of definition, and can best be understood by reflecting on some of the maxims in equity. (Canadian Abridgement, Second Edition, Vol. 14):

- P.296 EQUITY FOLLOWS THE LAW: Lord Tomlin: "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction."
- P.299 HE WHO SEEKS EQUITY MUST DO EQUITY: Riddell, J.: "...'he who seeks the assistance of a Court of Equity must in the matter in which he seeks assistance do what is just as a term of receiving such assistance'."
- P.300 HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS: Lord Mansfield in Holman v. Johnson, (98 E.R. 1120) p. 343:

L'appelant a épousé une immigrante reçue laquelle est à présent enceinte. Si l'appelant était expulsé et obligé de faire son service militaire, son épouse pourrait le suivre en Grèce ou rester au Canada; de toute façon l'appelant serait séparé de sa femme et de leur enfant pendant deux ans environ . Quant à l'épouse, l'expulsion de son mari signifie, soit renoncer à son statut d'immigrante reçue dans le cas où elle suivrait son époux en Grèce, soit rester au Canada avec son enfant et donc pourvoir aux besoins de l'enfant et aux siens pendant l'absence de son mari.

La Cour a démontré que les motifs de pitié qui justifient un redressement spécial ne proviennent pas uniquement de la situation de l'appelant. En effet, dans l'affaire Nikolaos AGOUROS, dossier no. 69-562, nous lisons en page 7:

"La portée de l'article 15(1)(b)(ii) s'étend aux personnes autres que la personne intéressée. Le "redressement spécial" lui est accordé, puisque c'est lui qui tombe sous la juridiction de la Commission, mais rien dans ce paragraphe ne limite comme au paragraphe 15(1)(b)(i), des "considérations d'ordre humanitaire et les motifs de pitié au seul appelant. Quoique ces considérations ne puissent certes pas s'appliquer à n'importe qui, la libellé du paragraphe permet clairement d'englober les personnes qui ont des liens étroits avec la personne intéressée, ceux dont l'avenir dépend intimement du sien et dont le sort sera directment touché par la décision prise à son sujet."

Sans doute l'expulsion de l'appelant impliquerait la séparation des membres de cette familly (M. et Mme G. Tzemanakis et leur enfant) et de fait M. et Mme Tzemanakis seraient soumis à des tribulations. Ainsi, dans cette affaire, la Commission se demande si les motifs de pitié et de considérations d'ordre humanitaire exposés justifient l'octroi d'un redressement spécial? Les tribulations qui découlent du mariage, de la grossesse, de la séparation, constituent-elles les seuls critères que la Cour doive retenir pour exercer sa compétence d'équité (equity)?

L'équité, fondement de l'article 15, n'est pas un concept que l'on peut aisément définir. Ainsi, afin d'en mieux saisir le sens, considérons quelques unes des maximes relatives à l'équité. (Canadian Abridgement, Second Edition, Vol. 14):

P.296 EQUITY FOLLOWS THE LAW: Lord Tomlin: "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction."

"No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise 'ex turpi causa', or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

These and other maxims concerning equity indicate clearly that equity is an exception to the letter of the law, a privilege, and that the right to benefit from special relief is predicated upon the good faith and the honest and responsible attitude of whomever seeks equity.

Anticipated hardships consequent to a deportation order caused to a Canadian citizen or to a landed immigrant, the problem posed by the presence of a Canadian-born child and possible prejudice caused to it, as well as countless other difficulties stemming from any source, are very important in the Court's decision concerning the exercise of the Court's equitable jurisdiction and are the objective factors for the granting of special relief under proper conditions. But these hardships or difficulties are not, nor should they be by themselves, the automatic entitlement to equity. The subjective factors involved, the attitude, the good faith, the intention, the behaviour of the person seeking equity, are equally important and, to my mind, should finally determine whether the exercise by the Court of its equitable jurisdiction is justified or not.

In Section 15 of the Immigration Appeal Board Act the legislature provided special relief for unusually difficult cases where the application of the letter of the law could be too rigid and which could even under certain circumstances give rise to veritable injustices. The equitable jurisdiction, particularly under Section 15(1)(b)(ii) of the Immigration Appeal Board Act, to my mind, can and should only be used when there is no other provision in the law for remedy of an unusual set of circumstances, and when the exigencies of the law have been complied with or when a sincere attempt in good faith to abide by the law has been made and when the action of those who seek equity can be considered as reasonable and responsible. Equity cannot be justifed when the evidence points to a careless disregard of the law or a wilful attempt to bypass it. The exercise by the Court of its equitable jurisdiction is in my opinion an exceptional remedy, in that Section 15 is not only different from the general provisions of the Immigration Laws but its exercise over-rides and annuls the normal effects of the application of the law and can reverse a judicious decision arrived at on strictly legal grounds.

- P.299 HE WHO SEEKS EQUITY MUST DO EQUITY: Riddell, J.: "...'he who seeks the assistance of a Court of Equity must in the matter in which he seeks assistance do what is just as a term of receiving such assistance'."
- P.300 HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS:
  Lord Mansfield in Holman v. Johnson, (98 E.R. 1120)
  p. 343: "No Court will lend its aid to a man who
  founds his cause of action upon an immoral or an
  illegal act. If, from the plaintiff's own stating
  or otherwise, the cause of action appears to arise
  'ex turpi causa', or the transgression of a positive
  law of this country, there the Court says he has no
  right to be assisted."

Entre autres maximes relatives à l'équité, celles citées ci-dessus montrent clairement que par rapport au sens littéral de la loi, l'équité constitue une exception, un privilège, et que l'octroi d'un redressement spécial dépend de la bonne foi, de l'honnêteté et de l'attitude digne de confiance manifestées par la personne qui a recours à l'équité.

Les tribulations futures conséquentes à l'ordonnance d'expulsion auxquelles seront soumis un citoyen canadien ou une immigrante reçue, le problème que pose la présence d'un enfant originaire du Canada, les préjudices éventuels qu'il subira, ainsi que bien d'autres questions influent grandement sur la décision de la Cour en ce qui regarde l'exercice de sa compétence d'équité. Tous ces facteurs objectifs présentés dans les circonstances appropriées justifient l'octroi d'un redressement spécial. Mais ces tribulations ou inconvénients ne sont pas en eux-mêmes suffisants pour amener automatiquement la Cour à exercer sa compétence d'équité. Les facteurs subjectifs, à savoir: l'attitude, la bonne foi, l'intention, le comportement de la personne qui a recours à l'équité sont également importants et selon moi, ces facteurs devraient en dernière analyse déterminer si l'exercice de la compétence d'équité par la Cour se justifie.

A l'article 15 de la Loi sur la Commission d'appel de l'immigration le législateur a prévu un redressement spécial dans les affaires particulièrement difficiles, instances où l'application de la Loi à lettre serait trop inflexible, ce qui pourrait amener de véritables injustices dans certaines situations. A mon avis, la compétence d'équité, notamment selon l'article 15(1)(b)(ii) de la Loi sur l'immigration, peut et doit être utilisée quand la loi ne prévoit aucune autre disposition pour remédier à un exceptionnel concours de circonstances, lorsque les prescriptions de la loi ont été respectées

The exceptional nature of Section 15 has nothing to do with the frequency or otherwise of its application, nor does it always require the existence of extraordinary circumstances. Each case must be dealt with on its own merits within the context of Section 15 of the Immigration Appeal Board Act. Nevertheless, Section 15, in my opinion, is an exception to the general Immigration Laws and, indeed, a privilege for the persons on whose behalf equitable jurisdiction is exercised. For these reasons it least to me to be most important that anyone appealing to the Court's equitable jurisdiction should conform in every way to the fundamental requirements of persons seeking equity. I do not believe that equity was meant to be so loosely applied that the exceptional remedy should become the rule and that the Law itself should be rendered inapplicable.

The appellant claimed that after all he was not a criminal, which is in all evidence apparently quite true. The Immigration Act is indeed not the Criminal Law nor is the attitude or the procedure of the Immigration Officer, the Special Inquiry Officer, or the Appeal Court that of a Criminal Court. But the Immigration Laws are valid statutes passed by Parliament for the control of immigration into Canada, with the economic and security interests of the country in mind. Regardless of their relative importance, the Immigration Laws are as valid and binding as are the Criminal Laws, and for as long as these laws are on the statute books they must be respected as much as any other law of the land.

What are the pertinent facts in the present case?

The appellant arrived on June 6, 1966 as a ship's deserter and remained in Canada without permission of the Immigration authorities after the departure of his ship.

In August 1969 the appellant was arrested and condemned to three months in jail.

On September 9, 1969 an inquiry was held and the appellant was ordered deported. The appellant appealed the order of deportation and was released on a \$200.00 cash bond. The appeal was heard on October 10, 1970. At the hearing, evidence was adduced to the effect that the appellant had married on March 8, 1970, six months after he was ordered deported, and that his wife was three months pregnant.

 $\,$  No doubt can be entertained as to the validity of the order on legal grounds.

However, does the appellant or his immediate family qualify for special relief under Section 15(1)(b)(ii)? There is no doubt that the hardships caused by the appellant's deportation do exist and are serious; but what about the subjective factors: the appellant's attitude, his intentions, his good faith, his submission to the law or his sincere desire to do so, as expressed in the maxims describing conditions and circumstances when equity can be justified?

ou lorsque une personne de bonne foi essaie sincèrement de se conformer à la loi et enfin quand les actions de ceux qui ont recours à l'équité peuvent être qualifiées de raisonnables et leur auteur de responsable. On ne peut justifier l'exercice de l'équité quand la preuve montre que la personne qui a recours à l'équité a inconsidérement enfreint la Loi ou a délibérément tenté de la contourner. A mon avis, la compétence d'équité exercée par la Cour est un recours exceptionnel, en ce sens que non seulement l'article 15 se différencie des dispositions générales de la Loi sur l'immigration, mais surtout que par son application il outrepasse et annule les effets réguliers de la loi et qu'il peut réformer une décision prise pour des motifs essentiellement légaux.

La nature exceptionnelle de l'article 15 n'affecte pas la fréquence de son application; en outre l'application de cet article ne réclame pas toujours de circonstances extraordinaires. La Cour doit examiner le fond de chaque affaire dans le cadre de l'article 15 de la Loi sur la Commission d'appel de l'immigration. J'estime, toutefois, que par rapport à l'ensemble des lois sur l'immigration l'article 15 constitue une exception, et bien entendu un privilège pour la personne à l'égard de laquelle la Cour exerce sa compétence d'équité. Donc, il me semble être de la plus haute importance que quiconque en appelle à la compétence d'équité de la Cour doit se conformer entièrement aux exigences fondamentales imposées aux personnes qui cherchent à obtenir l'équité de la Cour. Je ne pense pas que l'équité ait été établie pour être administrée abusivement au risque de voir un moyen exceptionnel rendu coutumier et la Loi en tant que telle devenir inapplicable.

L'appelant a déclaré qu'après tout il n'était pas un criminel, ce qui de toute évidence apparaît véridique. La Loi sur l'immigration n'est pas, bien sûr, le Code criminel; de même les procédures employées par le fonctionnaire à l'immigration, par l'enquêteur spécial, ou par la Commission d'appel de l'immigration ne sont pas celles d'une cour de juridiction criminelle. Par contre, les lois sur l'immigration sont des statuts valides édictés par le Parlement afin de contrôler l'immigration au Canada; en se faisant le législateur conserve à l'esprit les intérêts économiques et la sécurité du pays. Si nous faisons abstractions des différences d'importance relative entre les lois criminelles et celles de l'immigration, il n'en reste pas moins que celles-ci sont aussi valides et inviolables que celles-là; ainsi tant que ces lois sont en vigueur elles doivent être respectées au même titre que n'importe quelle loi canadienne.

Quels sont les faits pertinents dans cette affaire? Le 6 juin 1966 l'appelant arrive au Canada en tant que membre d'équipage du bateau l'Akmeon; il déserte l'Akmeon et après le départ de celui-ci il reste au Canada sans avoir demandé la permission de le faire aux autorités de l'immigration.

was the appellant's marriage entered into in good faith, or was it entered into for the purpose of bypassing the law and qualifying for special relief under Section 15? If it could be clearly proven that the marriage was entered into and the wife was made pregnant solely as a means of remaining in Canada, then the marriage would not have been contracted in good faith, and since "he who comes into equity must come with clean hands", there is no doubt that the appellant could not and should not be considered for special relief under Section 15(1)(b)(ii).

The proof of good faith or lack of it in a matter as intimate as a marriage is not easy to establish and all the facts should be considered. If the marriage were manifestly contracted in bad faith, the exercise of equitable jurisdiction would not be justified. However, in my opinion even though the marriage was entered into in good faith or was not proven to be of bad faith, this in itself is not sufficient to warrant the automatic exercise of the Court's equitable jurisdiction. It would seem to me that the elementary principles of law and justice cannot permit that equity become the accepted recourse of normal intelligent persons who have acted irresponsibly, negligently and carclessly.

In the present case, the appellant is an intelligent adult who was very much aware of the fact that he was illegally in Canada and that an order of deportation had been issued against him. The appellant none-theless married another intelligent adult who also knew that the man she was to marry was illegally in Canada and that he was the subject of an order of deportation. Both knew, of course, that the wife's pregnancy in a marriage is not an unusual occurrence. Nevertheless, both parties, fully aware of the circumstances, the risks and the possible consequences of the deportation order, entered of their own free will and by mutual consent into a marriage contract. At that moment, the appellants assumed, as all other couples who enter marriage, the obligations, the responsibilities and the consequences which are inherent in such a contract.

At the hearing of the appeal, the appellant sought special relief from the Court because he was married, that his wife was pregnant and that his deportation would cause hardships to himself, his wife and his child. These consequences, which to any reasonable person, were easily foreseeable, stem from a free and deliberate choice made by the appellant and his wife to enter into a marriage contract in spite of the very heavy risks involved in the fact of a valid deportation order against the husband.

Have the appellant and his wife shown an attitude "which attracts the exercise of equitable jurisdiction"? Do they really "come into equity with clean hands"? "In seeking equity have they done equity"?

En août 1969, l'appelant est arrêté et condamné à trois mois de prison.

Le 9 septembre 1969 une enquête est tenue et l'appelant se voit sommé d'expulsion. M. G. Tzemanakis appelle de l'ordonnance d'expulsion et est libéré après paiement d'un cautionnement de \$200. Le 10 octobre 1970 l'appel est entendu. A l'audience est introduite une preuve à l'effet que l'appelant s'est marié le 8 mars 1970, soit six mois après la signification de son expulsion, et que son épouse est enceinte de trois mois.

On ne peut contester la validité de l'ordonnance d'expulsion pour des motifs de droit.

Cependant, l'appelant ou sa famille immédiate peuvent-ils bénéficier du redressement spécial prévu à l'article 15(1)(b)(ii)? Sans aucun doute les graves tribulations qu'entraîneraient l'expulsion de l'appelant sont réelles et sérieuses; mais avons nous la même certitude au sujet des facteurs subjectifs? Ces facteurs définis par les maximes qui décrivent les conditions et les circonstances dans lesquelles on justifie le recours à l'équité sont: l'attitude de l'appelant, ses intentions, sa bonne foi, son obéissance à la loi ou son désir sincère de le faire.

L'appelant s'est-il marié en toute bonne foi, ou dans le but de contourner la loi et de bénéficier d'un redressement spécial aux termes de l'article 15? Si l'on pouvait prouver que l'appelant a contracté mariage et a mis son épouse enceinte à seule fin de demeurer au Canada, alors on pourrait dire que l'appelant n'a pas contracté mariage de bonne foi et puisque "celui qui invoque l'équité doit être sans reproches lui-même" dans ce cas l'appelant ne pourrait et ne devrait pas voir son cas examiné sous l'article 15(1)(b)(ii) en aucune façon.

Faire la preuve de la bonne ou mauvaise foi dans une situation aussi délicate qu'un mariage n'est pas aisé; c'est pourquoi tous les faits doivent être examinés. Si l'appelant a contracté mariage de mauvaise foi, la Cour ne peut justifier l'exercice de sa compétence d'équité. J'estime, cependant, que même si le mariage a été contracté de bonne foi ou si la mauvaise foi n'a pu être prouvée, ceci n'est pas suffisant pour justifier l'exercice automatique de la compétence d'équité par la Cour. Il me semble, que selon les principes élémentaires de justice on ne peut accepter que l'équité devienne le recours régulier adopté par des personnes intelligentes qui ont agi d'une manière irresponsable, négligente et irréfléchie.

Dans cette affaire, l'appelant est une personne adulte, intelligente et très consciente de l'existence de l'ordonnance

In my opinion, the attitude, the good faith, the reasonableness, and the sincerity of the person seeking equity, as adduced from the evidence in the case, are as important in exercising equitable jurisdiction as are the credible factual hardships involved, which form the objective aspect of the appellant's request for special relief.

However, basic to and more fundamental than the attitude, the good faith, the sincerity of the person seeking equity, which can be described as the subjective aspect of the appellant's request, there is an extremely important principle which underlies our whole system of law and indeed all forms of acceptable human relationships, and that principle is that: All intelligent, normal persons, acting of their own free will and in full knowledge of what they are doing are not only rightly held responsible for their acts but also for the consequences of their acts.

To disregard and to ignore too easily this basic principle even in the limited application of Immigration Law would be to undermine seriously the basic premise of all law and would further contribute to the destruction of a responsible society.

In the present instance, there is no doubt that the appellant's marriage was celebrated after the appellant had been ordered deported. But does the ex post facto marriage prove that the marriage was contracted in bad faith? Who can prove that the couple did not marry for love? However, even if the appellant was of good faith and did marry for love, is the Court justified in automatically qualifying the appellant for special relief on that ground alone, brushing aside and ignoring the elementary norms of personal responsibility which each individual must accept in a responsible society?

In testing the appellant's sense of responsibility and that of his wife, who can be considered for special relief under Section 15, the Court is faced with the following facts: The appellant knew from the moment he deserted his ship that he was illegally in Canada and avoided being apprehended in order that he would not be deported. The possibility therefore of being deported was much more than a risk in the mind of the appellant after having been ordered deported.

Both the appellant and his wife were intelligent enough and sufficiently well informed to understand and appreciate before their marriage the consequences to them of the appellant's deportation.

In spite of the fact that the appellant and his wife knew before being married that the appellant's deportation would present a choice on the part of the appellant's wife to either follow her husband to Greece or to remain in Canada and be separated from her deported husband, they chose of their own free will and in full knowledge of the consequences to marry anyway.

d'expulsion lancée contre elle, et de l'illégalité de son entrée au Canada. En dépit de cela, l'appelant a contracté mariage; son épouse, une personne adulte et intelligente, savait que son mari était entré illégalement au Canada et qu'il était sous le coup d'une ordonnance d'expulsion. Bien sûr, les deux personnes savaient que pour un couple la grossesse de l'épouse ne constitue pas un fait peu commun. Néarmoins, les deux personnes, en toute commaissance de cause, conscients des risques et des conséquences qu'entraîneraient une expulsion éventuelle, ont contracté mariage de plein gré et par mutuel consentement. A ce moment, comme tous les autres couples qui contractent mariage, les appelants ont assumés les obligations, les responsabilités et les conséquences inhérentes à la nature d'un tel contrat.

A l'audition de son appel, l'appelant a cherché à obtenir un redressement spécial attendu qu'il est marié, que son épouse est enceinte et qu'ainsi les effets de l'ordonnance d'expulsion soumettraient sa femme, son enfant et lui-même à de graves tribulations. Ces conséquences, que toute personne raisonnable aurait pu prévoir, ont pour origine une décision libre et délibérée prise par l'appelant et son épouse, à savoir: contracter mariage en dépit des risques importants qu'impliquaient de fait l'ordonnance d'expulsion valide à l'encontre de M. G. Tzemanakis.

L'appelant et son épouse ont-ils manifesté une attitude "qui inclinerait la Cour à exercer sa compétence d'équité"? De fait ont-ils "invoqué l'équité en étant sans reproche"eux-mêmes?"En cherchant à obtenir l'équité ont-ils agi avec équité?"

Je suis d'avis que l'attitude, la bonne foi, le caractère raisonnable et la sincérité de la personne qui a recours à l'équité de la Cour, facteurs qui doivent faire partie de la preuve de l'affaire, présentent un caractère aussi décisif pour la Cour qui exerce sa compétence d'équité que l'aspect objectif de la requête de l'appelant, à savoir les tribulations, qui de fait découlent de l'expulsion.

Par ailleurs, au-delà de l'aspect subjectif de la requête de l'appelant à savoir l'attitude, la bonne foi, la sincérité de la personne qui cherche à obtenir l'équité, il existe un principe des plus fondamentaux sur lequel repose la loi et toutes formes de relations humaines à savoir: toute personne intelligente, normale qui agit d'ellemême, de plein gré et en toute connaissance de ce qu'elle fait, est non seulement responsable de ses actes mais aussi pour les conséquences de ceux-ci.

Ne pas tenir aucun compte de ce principe et le passer outre même dans l'application restreinte de la Loi sur l'immigration, équivaudrait à saper dangereusement le fondement de la loi, de plus aiderait à la destruction d'une société établie sur la responsabilité de ses membres.

Can the Court be accused of lacking in compassion, of being inhuman or of evading its responsibility in declining to exercise its equitable jurisdiction under Section 15 in this case by suggesting that the appellant and his wife are and must be held responsible for their acts as indeed are all Canadians under similar circumstances?

I doubt that the legislature intended to grant more legal rights and privileges to a person illegally in Canada than those which are available to Canadian citizens, which is, in my opinion, what the Court would be doing in granting special relief under Section 15 of the Immigration Appeal Board Act in the circumstances of this case.

The Court therefore dismisses the appeal on legal grounds under Section 14 of the Immigration Appeal Board Act, and for the above reasons declines to exercise its equitable jurisdiction under Section 15 of that Act.

The Court dismisses the appeal and orders that the order of deportation be executed as soon as practicable.

Montréal, October 16, 1970.

Concurred in by: Miss Janet V. Scott, Chairman and Jean-Pierre Houle, Vice-Chairman.

For the appellant: nil

for the respondent: Jacques Pépin, Esq.

Dans cette affaire, sans aucun doute l'appelant a contracté mariage après la signification de son expulsion. Cependant, ce mariage ex post facto montre-t-il que l'appelant l'a contracté de mauvaise foi? Qui peut prouver que les époux ne se sont pas mariés par amour? Cependant, même si l'appelant s'est marié de bonne foi et par amour la Cour peut-elle justifier l'exercice de son équité pour cet unique motif, en rejettant et en passant outre les normes élémentaires inhérentes à la responsabilité personnelle, normes que chaque individu doit accepter dans une société fondée sur le sens de la responsabilité de ses membres.

Lorsque la Cour cherche à déterminer le sens des responsabilités manifesté par l'appelant et son épouse (qui peut bénéficier du redressement spécial prévu à l'article 15), la Cour, donc, examine les faits suivants: dès l'instant où il a quitté son bateau l'appelant savait qu'il était illégalement entré au Canada, ainsi il a évité d'être appréhendé afin d'éviter l'expulsion. En conséquence, pour M. G. Tzemanakis après la signification de son expulsion, l'éventualité d'une expulsion fut donc plus qu'un risque possible.

L'appelant et son épouse sont assez intelligents et suffisamment bien renseignés pour avoir compris et évalué, avant leur mariage, les conséquences qu'entraineraient l'expulsion de l'appelant.

Avant leur mariage l'appelant et son épouse savaient que l'expulsion de l'appelant placerait l'épouse devant le choix suivant: ou suivre son mari en Grèce, ou bien rester sans lui au Canada. Néanmoins ils se sont mariés de plein gré et conscients des conséquences de leur acte.

Peut-on accuser la Cour de manquer de compassion, d'être inhumaine, ou de se soustraire à ses responsabilités puisqu'elle refuse d'exercer sa compétence d'équité prévue à l'article 15 en maintenant que l'appelant et son épouse doivent être tenus responsables pour leur acte, ainsi que dans une situation semblable le serait tout canadien?

Je doute que le législateur ait voulu accorder plus de droits et privilèges à une personne entrée illégallement au Canada qu'à un citoyen canadien. J'estime, que si dans cette affaire la Cour accordait à l'appelant le redressement spécial prévu à l'article 15 de la Loi sur la Commission d'appel de l'immigration elle reconnaîtrait plus de droits et privilèges à une personne entrée illégalement au Canada qu'à un citoyen canadien.

La Cour, en conséquence, rejette l'appel pour des motifs de droit aux termes de l'article 15 de la Loi sur la Commission d'appel de l'immigration et pour les raisons exposées ci-dessus refuse d'exercer sa compétence d'équité prévue à l'article 15 de la Loi.

La Cour rejette l'appel et ordonne que l'ordonnance d'expulsion soit exécutée dès que possible.

Montréal, le 16 octobre 1970.

Ont souscrit: Mlle Janet V. Scott, président, et Jean-Pierre Houle,

vice-président.

Pour 1'appelant: aucun;

pour l'intimé: M. Jacques Pépin.

**RESUMES** 

RÉSUMÉS



38. Lancelot CHIRWA,

appellant,

V .

The Minister of Manpower and Immigration,

respondent.

Date of the decision: August 29, 1969; File: 68-5672.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Section 15 Immigration Appeal Board Act. - "compassionate and humanitarian considerations" - meaning of. - Immigration Act and Immigration Appeal Board Act - nature of. - Immigration Appeal Board Act: 15(1)(b)(i) and (ii).

Appellant, a citizen of Malawi, aged 27, married to an American citizen and with one child born in the U.S.A., sought entry to Canada as a visitor on August 1, 1968. After an inquiry he was ordered deported on August 2, 1968, and he appealed to this Board. Before this appeal was heard, he was made the subject of two further deportation orders dated October 16 and 31, 1968 respectively. His appeal from these orders was heard and dismissed. On February 18, 1969, a Motion was filed on his behalf to reopen the appeal and hear new evidence pursuant to section 15 of the Act. The motion was granted on April 16, 1969.

Held: Section 15(1)(b)(ii) gives the Board discretionary power - the words "in the opinion of" used in the subsection make this quite clear. This discretion extends to the appellant and to other persons who are closely connected with him and who are directly affected by his fate. This discretion however, is judicial discretion, i.e. it must be founded on evidence, and the wording of the section makes it quite clear that the test is objective and not subjective. While the definition of "compassion" implies an element of subjectivity, since emotion is involved, it is clear that no judicial decision or finding, no matter how discretionary, can be based on emotion. The meaning of the words "compassionate considerations" in the context of Section 15(1)(b)(ii) must therefore be taken to be those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes "warrant the granting of special relief" from the effect of the provisions of the Immigration Act. The Immigration Act and the Immigration Appeal Board Act are in pari materia. It is clear that in enacting Section 15(1)(b)(ii) Parliament intended to give this Court the power to mitigate the rigidity of the law in an appropriate case, but it is equally clear that Parliament did not intend Section 15(1)(b)(ii) of the Immigration Appeal Board Act to be applied so widely as to destroy the essentially exclusionary nature of the Immigration Act and Regulations.

38. Lancelot CHIRWA,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 29 août 1969; Dossier: 68-5672.

Coram: M11e J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Article 15 de la Loi sur la Commission d'appel de l'immigration."motif de pitié et considérations d'ordre humanitaire - sens de.Loi sur l'immigration et Loi sur la Commission d'appel de l'immigration
- nature de. - Loi sur la Commission d'appel de l'immigration: 15(1)
(b)(i) et (ii).

L'appelant est un citoyen de Malawi; il est âgé de 27 ans et il a épousé une citoyenne américaine et de leur union est né un enfant; le ler août 1968 il a cherché à venir au Canada à titre de visiteur. Après enquête, le 2 août 1968 il a été sommé d'expulsion et il a appelé devant la Commission. Avant l'audition de l'appel il s'est vu l'objet de deux autres ordonnances d'expulsion rendues respectivement le 16 et le 31 octobre 1968. La Commission a entendu l'appel des ordonnances et l'a rejeté. Le 18 février 1969 en son nom était déposée une requête de réouverture d'instance pour entendre une nouvelle preuve selon l'article 15 de la Loi. Le 16 avril 1969 on accordait la requête.

Arrêt: L'article 15(1)(b)(ii) conferre à la Commission un pouvoir discrétionnaire - les mots "de l'avis de" utilisés dans l'alinéa indiquent clairement la discrétion que la Commission peut utiliser ce pouvoir à l'égard de l'appelant et des autres personnes dont le sort est affecté par celui de l'appelant. Cette discrétion est toutefois une discrétion judiciaire, i.e. elle doit être fondée sur la preuve, et le libellé de l'article exprime clairement que le critère est objectif et non subjectif. Bien que la définition de pitié comprenne un élément de subjectivité puisque l'émotion est impliquée, il est manifeste que nulle décision ou déclaration à caractère juridique, quelque soit la discrétion de l'autorité qui l'exprime, ne peut se fonder sur l'émotion. La signification de l'expression motifs de pitié tirée de l'article 15(1)(b)(ii) doit être en étroite liaison avec les faits, (établis par la preuve) qui inciteraient un bon père de famille d'une société civilisée à désirer soulager les malheurs d'une autre personne - dans la mesure ou ces malheurs justifient l'octroi d'un redressement spécial appliqué aux effets des dispositions de la Loi sur l'immigration. La Loi sur l'immigration et la Loi sur la Commission d'appel de l'immigration sont "in pari materia". Il est clair qu'en promulguant l'article 15(1)(b)(ii) le Parlement a

The same arguments apply to the phrase "humanitarian considerations."

In the instant case, can it be said that a reasonable man in the rational exercise of his "regard for the interests of mankind" as understood in a civilized community in the twentieth century, would fail to make a decision which would assure the continued existence of this family as a viable unit? In the Board's opinion it cannot. The only way to solve the problem is to quash the order made against the appellant on August 2, 1968, and direct that he be admitted to Canada as a landed immigrant, pursuant to Section 15 of the Immigration Appeal Board Act.

For the appellant: J.V. O'Donnell, advocate; for the respondent: Mr. Jacques Pépin, Esq.

jugé approprié de donner à cette cour le pouvoir d'assouplir la rigidité de la Loi dans un cas spécial, mais il est également évident que le Parlement n'a pas voulu que l'article 15(1)(b)(ii) de la Loi sur la Commission d'appel de l'immigration soit appliqué d'une façon si large qu'il détruise la nature essentiellement exclusive de la Loi sur l'immigration et de son Règlement.

Le même raisonnement s'applique à l'expression "considérations d'ordre humanitaire".

Dans cet appel, peut-on dire qu'un bon père de famille dans l'exercice rationnel de son"souci du prochain", ainsi que l'entend une société civilisée contemporaine, pourrait ne pas se prononcer pour la décision qui assurerait à cette famille la continuation de son existence à titre de cellule vivante. La Commission déclare que non. La seule façon de résoudre le problème est d'annuler l'ordonnance d'expulsion rendue contre l'appelant le 2 août 1968 et conformément à l'article 15 de la Loi sur la Commission d'appel de l'immigration d'ordonner qu'il soit admis au Canada à titre d'immigrant reçu.

Pour l'appelant: Me J.V. O'Donnell; pour l'intimé: M. Jacques Pépin. 39. Veronica Elaine WILLIAMS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: January 15, 1970; File: 68-6061.

Coram: Miss J.V. Scott, Chairman, F. Glogowski, J.A. Byrne.

Assessment - intended occupation not divulged until inquiry - inquiry reopened on Board's order - duty of Special Inquiry Officer to order reassessment - lack of full and proper inquiry: Immigration Act: 11(3) (e), 27(4); Immigration Regulations: 34(3)(f), Schedule A; Immigration Appeal Board Act: 13.

The appellant is a 23 year old citizen of Jamaica, unmarried, who was admitted to Canada as a visitor on April 27, 1968, for a period to expire May 27, 1968. On June 11, 1968, she filed an application for Permanent Residence in Canada, was interviewed and was "assessed" at 41 units. The results of this assessment were incorporated in the Report pursuant to section 23, dated July 30, 1968, which preceded the inquiry which resulted in a deportation order. At the hearing of the appeal, the Board ordered reopening of the inquiry pursuant to section 13 of its Act "to receive additional evidence or testimony in respect of (appellants's) assessment, together with such other additional evidence or testimony which may be adduced before" the Special Inquiry Officer.

 $\underline{\text{Held}}$ : The appellant had the burden of proving that the assessment was manifestly wrong (S. 27(4) Imm. Act) but although this was not done on the merits of the assessment as to occupational demand, sufficient doubt was cast on whether there had ever been an assessment at all to shift the burden to the Minister (i.e. the Special Inquiry Officer) to prove a proper assessment on this point. Such proof was never made as the appellant did not specify to the assessing officer the trade or profession which she intended to follow in Canada until she was in a position to start training as a nurse.

The Special Inquiry Officer also failed to provide a full and proper inquiry in respect of appellant's intention, expressed at the inquiry, to pursue the occupation of nursemaid. It is the Special Inquiry Officer who, after inquiry, has the power to admit the person concerned or order him deported. It is the latter's eligibility for admission or liability to deportation at the date of the inquiry which is there in issue. In the instant appeal, the inquiry took place in October 1968 and the assessment in June of the same year. The question of new information as to occupational demand never arose, but there was clear evidence before

39. Veronica Elaine WILLIAMS,

appelante,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 15 janvier 1970; Dossier: 68-6061.

Coram: Mlle J.V. Scott, président, F. Glogowski, J.A. Byrne.

/ Evaluation - jusqu'à l'enquête, l'emploi que le demandeur compte exercé n'est pas révélé - réouverture de l'enquête par ordre de la Commission - obligation de l'enquêteur spécial d'ordonner la réévaluation - enquête non-complète, non-régulière: Loi sur l'immigration: 11(3)(e), 27(4); Règlement sur l'immigration: 34(4)(f), Annexe A; Loi sur la Commission d'appel de l'immigration 13.

L'appelante est une citoyenne de la JamaTque, c'est une célibataire, âgée de 23 ans qui a été admise au Canada en tant que visiteur le 27 mai 1968. Le 11 juin 1968 elle a déposé une demande de résidence permanente, a subi un examen et s'est vu attribuée 41 unités d'évaluation. Les résultats de l'évaluation ont été inclus dans le rapport prévu à l'article 23, daté du 30 juillet 1968; rapport à l'origine de l'enquête au terme de laquelle l'ordonnance d'expulsion a été émise. À l'audition de l'appel, la Commission a ordonné la réouverture de l'enquête en vertu de l'article 13 de la Loi afin de "to receive additionnal evidence or testimony in respect of (appellant's) assessment, together with such other additional evidence or testimony which may be adduced before "l'enquêteur spécial".

Arrêt: Selon l'article 27(4) de la Loi sur l'immigration il incombe à l'appelant de prouver que l'évaluation était manifestement erronée; bien que le fond de l'évaluation au titre offre d'emploi n'ait pas été contesté le doute porte sur ceci: y-a-t-il eu évaluation? C'est à présent au Ministre (c'est-à-dire à l'enquêteur spécial) qu'il incombe de prouver qu'il y a eu évaluation régulière. Cette preuve n'a jamais été faite puisque l'appelante n'a pas mentionnée la profession ou l'emploi qu'elle comptait exercer au Canada; cette intention n'a été révélée qu'à l'époque où l'appelant a pu commencer un cours de formation d'infirmière.

Quant à l'intention de l'appelante (exprimée à l'enquête) de devenir infirmière l'enquêteur spécial n'a pas procédé à une enquête complète et régulière. Après l'enquête, l'enquêteur a le pouvoir d'admettre la personne intéressée ou bien d'ordonner son expulsion. Pour cette dermière le litige repose sur sa qualification a être admise ou sur la possibilité de son expulsion à l'époque de l'enquête. Dans cet appel, l'enquête a eu lieu en octobre 1968 et l'évaluation en juin 1968.

the Special Inquiry Officer of a change in the occupation the appellant intended to follow in Canada - or at any event, he was aware of a bona fide intention which admittedly had never been expressed before or communicated to the assessing officer. It was his duty, under the circumstances of this case, to order a reassessment.

The Special Inquiry Officer seems to have made up his mind that Miss Williams was not qualified to be a nursemaid and therefore declined to order a reassessment. Reading the evidence as a whole, both at the original and reopened inquiry, Miss Williams made a prima facie case that she was so qualified. His failure to order her reassessed in the course of the original inquiry, and certainly in the course of the reopened inquiry, was a failure to provide a full and proper inquiry. Appeal allowed.

For the appellant: Andrew Brewin, Barrister and Solicitor; For the respondent: E. Sojonky, Barrister and Solicitor.

Une question ne s'est jamais posée, celle de renseignements additionnels relatifs au titre offres d'emplois; mais la preuve apportée devant l'enquêteur spécial manifeste un changement relatif à l'emploi que l'appelante comptait exercer au Canada - tout au moins, il était conscient de la bonne foi de l'appelante bien que l'on reconnaisse que cette bonne foi n'ait jamais été ni exprimée ni communiquée à l'enquêteur spécial manifeste un changement relatif à l'emploi que l'appelante comptait au Canada - tout au moins, il était conscient de la bonne foi de l'appelante bien que l'on reconnaisse que cette bonne foi n'ait jamais été ni exprimée ni communiquée à l'enquêteur spécial. D'après les circonstances de cette affaire, l'enquêteur spécial avait l'obligation d'ordonner une réévaluation.

Il semble que l'enquêteur spécial s'était formé une opinion négative quand à la compétence de Mlle Williams de devenir infirmière et en conséquence il n'était pas porté à ordonner une réévaluation. L'examen d'ensemble de la preuve apportée à l'enquête et à la réouverture de l'enquête, montre que cette affaire constitue un cas prima facie et que Mlle Williams avait la compétence de devenir infirmière. Durant la première enquête l'enquêteur spécial n'a pas ordonner la réévaluation de Mlle Williams, et sans aucun doute l'enquête réouverte a été incomplète et irrégulière.

Appel accueilli.

Pour l'appelante: Me Andrew Brewin; Pour l'intimé: Me E. Sojonky. 40. Jerzy TYMOSZCZUK,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: April 21, 1970; File: 69-1421.

Coram: Jean-Pierre Houle, Vice-Chairman, Lucien Cardin, Gérard Legaré.

Employment - lack of permit - error as to consent of parties - lack of consideration - contract for services null and void. - Immigration Regulations: 34(3)(3); Civil Code of Québec; 984, 989, 992, 1760.

The appellant, a widower and graduate engineer, was born June 16, 1931 at Luboml, Poland. He entered Canada on June 24, 1968 and was granted visitor's status until September 24, 1968, to visit his cousin in Montréal. On October 10, 1968, he applied for permanent residence. He worked for Degrémont Canada Ltée from October 2, 1968 to October 10, 1968, having been told that all necessary paper work with the Government would be looked after would include the working permit, etc., from the Immigration authorities. Upon learning that no such permission to work was obtained, he did not accept the money he earned for one week's work.

Held: A misunderstanding arose between appellant and the Company as to the obligation on the part of the latter to obtain for the appellant the necessary working permit from the Immigration Department. Hence there was then no valid contract for the hire of appellant's services pursuant to section 1760, 984 and 992 of the Civil Code of Québec, as consent is essential to a contract.

Neither was there any consideration for the work done by the appellant as required by section 989 of said Code.

Appeal allowed.

For the appellant: J. Zascinski, advocate; for the respondent: G. Roméo Léger, advocate.

40.
Jerzy TYMOSZCZUK,

appelant,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 21 avril 1970; Dossier: 69-1421.

Coram: Jean-Pierre Houle, vice-président, Lucien Cardin, Gérard Legaré.

Emploi - sans permis - malentendu relatif au consentement des parties absence de considération - contrat de services nul et non avenu - Règlement sur l'immigration: 34(3)(3); Code civil de la province de Québec: 984, 989, 992 et 1760.

L'appelant est né le 16 juin 1931 à Luboml, Pologne; il est veuf et ingénieur diplômé. Dans le but de rendre visite à son cousin à Montréal, il est entré au Canada le 24 juin 1968 et s'est vu accordé un visa de visiteur valable jusqu'au 24 septembre 1968. Le 10 octobre 1968, il a présenté une demande de résidence permanente. Du 2 octobre 1968 au 10 octobre 1968 il a travaillé pour Degrémont Canada Ltée; il lui a été dit que cette société ferait les démarches auprès du gouvernement pour obtenir les papiers nécessaires relatifs au travail. À cause de difficultés de langues, l'appelant a pensé que ceci comprenait le permis de travail, etc., délivré par les autorités de l'immigration. Lorsqu'il a appris qu'il n'avait pas cette autorisation, il a refusé l'argent du travail d'une semaine.

Arrêt: Entre la société et l'appelant il y a eu un malentendu quant à l'obligation de celle-ci d'obtenir pour l'appelant le permis de travail nécessaire délivré par le ministère de l'immigration. Donc, il n'y a pas eu de contrat valide de louage de services passé entre l'appelant et la société selon les articles 1760, 984, et 992 du Code civil de la province de Québec puisque le consentement est de nature essentielle pour un contrat.

Il n'y a pas eu non plus, de clause relative au travail de l'appelant comme le prescrit l'article 989 du Code. Appel accueilli.

Pour l'appelant: Me J. Zascinski; Pour l'intimé: Me G. Roméo Léger. 41. Hilary Lynne PERKINS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 5, 1970; File: 69-1991.

Coram: J.C.A. Campbell, Vice-Chairman, F. Glogowski, U. Benedetti.

Inquiry - uncontradicted evidence of appellant's impaired judgment - Special Inquiry Officer's duty not to proceed - lack of full and proper inquiry - Immigration Act 11(3)(e), 37(1).

Mrs. Perkins, twenty-eight years old, was born on November 17, 1941, in Calgary, Alberta. She became an American citizen by naturalization on October 13, 1967. She married an American soldier in Montana in December 1962. A daughter - included in the deportation order - was born on June 11, 1968 in Alaska. Not getting along with her husband and mother-in-law, she left with her daughter and entered Canada as non-immigrant in October 1968. On July 29, 1969, she was convicted on charges of false pretenses and was sentenced to jail. While serving her sentence she was transferred to hospital, due to her mental condition; an Inquiry was held there and a deportation order issued on October 15, 1969. In hospital she gave birth to another daughter.

<u>Held</u>: The Special Inquiry Officer had before him the uncontradicted medical evidence that appellant's judgment was impaired and that she did not really appreciate the consequences of her situation. Despite this, he proceeded with the questioning of the appellant and based his decision on the answers elicited by him. Therefore there was no full and proper inquiry.

Both appeals allowed.

For the appellant: R. St-Pierre, Esq.,

For the respondent: P. Betournay, Barrister and Solicitor.

41. Hilary Lynne PERKINS,

appelante,

С.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 5 mars 1970; Dossier: 69-1991.

Coram: J.C.A. Campbell, vice-président, F. Glogowski, U. Benedetti.

Enquête - preuve sans contredit de la défaillance de jugement de l'appelante - l'obligation de l'enquêteur spécial de ne pas procéder - enquête non complète et non régulière - Loi sur l'immigration: 11(3)(e) et 37(1).

Mme Perkins est née le 17 novembre 1941 à Calgary Alberta. Elle a obtenu la naturalisation américaine le 13 octobre 1967 et est devenu ainsi citoyenne américaine. Dans le Montana en décembre 1962 elle a épousé un soldat américain. Sa fille - comprise dans l'ordonnance d'expulsion - est née le 11 juin 1968 en Alaska. Ne s'entendant ni avec son mari ni avec la mère de celui-ci elle les a quités en emmenant sa fille. En octobre 1968, elle est entrée au Canada en tant que non-immigrante. Le 29 juillet 1969 elle a été condammée pour fausses allégations et a été emprisonée. Lorsqu'elle purgeait sa peine, elle a été hospitalisée, a cause de sa santé mentale; une enquête a alors été tenue au terme de laquelle le 15 octobre 1969 une ordonnance d'expulsion a été émise. À l'hôpital elle a donné naissance à une autre fille.

Arrêt: L'enquêteur spécial a eu devant lui la preuve médicale sans contredit de la défaillance de la raison de l'appelante qui n'a pu réellement saisir les conséquences de sa situation. En dépit de ceci il a procédé à l'interrogatoire de l'appelante et a fondé sa décision sur les réponses recueillies. En conséquence l'enquête n'a pas été complète et régulière.

Appels accueillis.

Pour l'appelante: M. P. St-Pierre; Pour l'intimé: Me P. Betournay.

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